DOCUMENT RESUME

ED 229 118 PS 013 472

AUTHOR Foerster, Frank; Spearly, James L.
TITLE Legal Aspects of Child Abuse and Neglect Cases in Texas: A Compendium of Cases and Statutory Provisions.
INSTITUTION Texas Univ., Austin. Region VI Resource Center on Child Abuse and Neglect.
SPONS AGENCY Administration for Children, Youth, and Families (DHHS), Washington, D.C.; Portland State Univ., Oreg. Regional Research Inst. for Human Services.; Texas State Dept. of Human Resources, Austin.
PUB DATE [81]
NOTE 141p.
AVAILABLE FROM Region VI Resource Center for Children, Youth, and Families, 2609 University Avenue, Suite 4.108, Austin, TX 78712 (Paper, $5.00).
PUB TYPE Guides - Non-Classroom Use (055)

EDRS PRICE MF01/PC06 Plus Postage.
DESCRIPTORS Adoption; *Child Abuse; *Child Neglect; Compliance (Legal); *Court Litigation; Guidelines; *Legal Responsibility
IDENTIFIERS *Texas

ABSTRACT

Designed to assist attorneys, social workers, and other interested parties, this manual describes work with child abuse and neglect cases in Texas. After a brief overview of the child abuse and neglect issue in that state, as well as an examination of the role of the Texas Department of Human Resources, the manual discusses suits affecting the parent/child relationship in Texas and outlines in detail the stages in a child abuse case from emergency removal through adoption. A conclusion provides a brief discussion of the Indian Child Welfare Act and Title 4 of the Texas Family Code (entitled "Protection of the Family"). A list of related reading materials and copies of the Indian Child Welfare Act and the Texas Family Code are appended. (MP)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED229118

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

Legal Aspects of Child Abuse and Neglect Cases in Texas:

A Compendium of Cases and Statutory Provisions

Frank Foerster, JD

James L. Spearly, JD

PS013472

Child Abuse and Neglect Resource Center

The University of Texas at Austin

LEGAL ASPECTS OF CHILD ABUSE AND NEGLECT CASES IN TEXAS: A COMPENDIUM OF CASES AND STATUTORY PROVISIONS

Frank Foerster, J.D.

James L. Spearly, J.D.

Region VI Resource Center on Child Abuse and Neglect

The University of Texas at Austin

Austin, Texas

TABLE OF CONTENTS

	Page
FOREWARD	v
ACKNOWLEDGEMENTS	vi
CHAPTER I. INTRODUCTION	
A. Child Abuse and Neglect	1
1. The Problem	1
2. Approaches - Punishment v. Treatment	2
3. The Court's Role in Child Protection - Balancing the Rights	3
4. Definitional Problems Between Legal and Non-Legal Professionals	4
B. The Role of the Texas Department of Human Resources in Child Abuse and Neglect	5
1. The Role as Defined by Law	5
2. DHR Family Support Services	7
3. DHR Care of Abused and Neglected Children Outside the Home	8
CHAPTER II. SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP IN TEXAS	
A. Definitions	12
1. Defining the Child and the Parent	12
2. Defining the Parent-Child Relationship	13
3. Defining the Suit Affecting the Parent-Child Relationship (SAPCR)	14
4. Scope of Suit Authorized	14
5. Who May Bring a Parent-Child Suit	15
6. Courts with Jurisdiction Over the Parent-Child Suit	15
B. Introduction to Jurisdiction and Venue	16
1. Original Jurisdiction of SAPCR	16
2. Continuing Jurisdiction	17
3. Venue for the Parent-Child Suit	19
C. Transferring the Parent-Child Suit	20
D. Acquiring Jurisdiction Over a Non-Resident	23
E. Citation and Notice of Parent-Child Suits	23

Page

CHAPTER III. STAGES OF A CHILD ABUSE AND NEGLECT CASE IN TEXAS

A. Texas Legal Process for Child Abuse Cases: An Overview 26

B. Child Abuse and Neglect Reporting - Chapter 34, Texas Family Code 27

C. Emergency Protection of the Child - Chapter 17, Texas Family Code 29

D. Court Action Pending Final Hearing in a Suit Affecting the Parent-Child Relationship 31

1. Temporary Court Orders 31
2. Supportive Services for the Family Unit 33
3. Some Practical Considerations for the Adversaries 35

E. Judicial Monitoring of the State Foster Care System - Chapter 18, Texas Family Code 38

F. Managing Conservatorship - Chapter 14, Texas Family Code 41

G. Termination of the Parent-Child Relationship - Chapter 15, Texas Family Code 42

H. Adoption - Chapter 16, Texas Family Code 62

I. Appeals 68

CHAPTER IV. TRIAL ISSUES

A. Non-Evidentiary Issues 72

1. Hearing 72
2. Presumption on Behalf of Natural Parents 73
3. Jury Trial 73
4. Right to Counsel 73

B. Evidentiary Issues 75

1. Testimonial Privilege 75
2. Standard of Proof 75
3. Social Study 76
4. Expert Testimony 77
5. Hospital Records and X-Rays 78
6. Photographs 79
7. Circumstantial Evidence 79

Page

CHAPTER V. MISCELLANEOUS

A. Indian Child Welfare Act 83

B. Texas Family Code Title 4 - Protection of the Family 84

BIBLIOGRAPHY

APPENDICES

A Review of Children in Placement, Commentary on Title 2, Chapter 18, Texas Family Code, By Judge Enrique Pena

B Indian Child Welfare Act of 1978, Title I and Summary

C Protection of the Family, Title 4, Chapter 71, Texas Family Code

FOREWARD

This manual is designed to assist attorneys, social workers, and other interested parties to understand and work with child abuse and neglect cases in Texas. After a brief overview of issues in child abuse and neglect, the manual discusses suits affecting the parent-child relationship in Texas and outlines in detail the stages in a child abuse case from emergency removal through to adoption. It concludes with brief discussions of the Indian Child Welfare Act and Title 4 of the Texas Family Code, entitled Protection of the Family.

We hope that the manual will assist attorneys representing the state, the parents, or the children in their preparation for these cases. For the lay person reading the manual, we hope he or she may gain useful insight into the legal aspects of child abuse. Finally, it is hoped that the manual in some small way will improve the Texas judicial and administrative systems' handling of abuse and neglect cases for the benefit of parents and children who become involved in them.

The reader should note that the statutory provisions and case law reported here are current only through December of 1980. Any amendments to the Texas Family Code, or cases modifying that Code reported subsequent to this date, are not reflected in this publication. An excellent source for updating the case law in this area is the Family Law Section Report of the State Bar of Texas.

ACKNOWLEDGEMENTS

We would like to thank our research assistants Marilyn Rauch, a University of Texas law student, and Melodie Kramer, graduate student in social work, for their invaluable aid. And we would also like to thank Ana Pozo, Susan Hollon, and John J. Specia, Regional Attorneys with the Texas Department of Human Resources; J.B. McReynolds, Supervising Attorney with DHR's Legal Division; and Michael Wald, Professor of Law at Stanford University, who took the time to read and comment on earlier drafts of the manual. In addition, we appreciate the helpful comments made by Judges Carol Higley Lane of Houston and Enrique Peña of El Paso. Our special thanks go to John J. Sampson, Professor of Law at The University of Texas Law School and co-editor of the State Bar Family Law Section Report, for his careful review of earlier manuscripts and his analysis of recent case law.

This publication was made possible with funds received from the National Center on Child Abuse and Neglect, Children's Bureau, Administration for Children, Youth and Families, Office of Human Development Services, Department of Health and Human Services; the Texas Department of Human Resources; and the Regional Research Institute for Human Services at Portland State University, Portland, Oregon.

CHAPTER I.

INTRODUCTION

A. Child Abuse and Neglect

1. The Problem

The extent of reported child abuse and neglect, when viewed together with the possible effects they may have on individual health and development, indicates that the future functioning of a large number of this country's children is being threatened. Estimates now place the number of children per year who are maltreated to be above 1,000,000: an estimated 200,000 to 500,000 are physically abused; 60,000 to 100,000 are sexually abused; and 400,000 to 600,000 are neglected.[1]

In 1978, the American Humane Society published an Executive Summary of its National Analysis of Official Child Abuse and Neglect Reporting. The study substantiated cases of child abuse and/or neglect at all income levels, although most reported cases involved lower socioeconomic families.[2] Noteworthy was the fact that in 82% of all validated cases, the abused and/or neglected child was not removed and remained in the home with the family. The study also showed that the family characteristics associated with child abuse are different from those most evident in child neglect. In neglect, environmental stress factors (e.g., poverty; broken family; poor housing) are more prevalent than the personal characteristics or inability to cope factors (e.g., lack of tolerance; loss of control during discipline) often found in cases of abuse.

Although perplexing, most of the parents who commit abusive acts

fall within the psychological norms of our population. Helfer and Kempe state:

> Approximately 10 to 15 percent of parents seen have psychiatric diagnoses that make their potential for treatment poor. These diagnoses include parents who are psychotic, particularly those who appear as paranoid schizophrenic or schizophrenic patients with a delusional system that involves the child as part of the delusional system... (But)... approximately 85 percent of abusive parents will remain whose personality diagnoses cover the spectrum seen in the general population.[3] (emphasis added)

Texas statistics reflect the national figures. The most recent study, a 1979 survey of 2,000 Texas residents prepared for the Texas Council of Child Welfare Boards, generalized its findings to the Texas population:

> Each year 8.5% to 17% of Texas children are at risk of abuse (either physical, sexual, or emotional) or neglect. Based on the 1970 census, 283,000 children age 14 and under are at risk of abuse in Texas each year.
>
> 14.3% of the survey's respondents reported they had been abused during childhood. Based upon the 1970 census data, at least 1,231,783 adults in Texas were abused or neglected during their childhood.[4]

Given the extensiveness of the problem - what has been our response?

2. Approaches - Punishment vs. Treatment

The reaction to child abuse in the United States has divided into two major positions: punishment and treatment.[5] For those who view child abuse as a contemptible act, the initial reaction is criminal prosecution of the parents and permanent removal of the child from the home. For those who see child abuse as a family problem, rehabilitative efforts are to be offered for parents and children with the aim of

protecting children and preserving the family where possible. Removal of the child is viewed as temporary and as an adjunct to rehabilitation to be used only when absolutely necessary. Seeking prosecution or final termination of parental rights would be a last alternative to be used if parents continue to endanger their child's health or safety or fail to improve despite attempts at rehabilitation.

3. The Court's Role in Child Protection - Balancing the Rights

Unlike the various helping professionals who see their roles as protecting children and/or rehabilitating families, the legal system operates from a different perspective. The primary role of the court must be to discern the individual rights and liberties at stake and to determine, through an adversarial process, the facts of each case. The rights of parents, the state, and children often present difficult, if not impossible, choices for the court when they clash in child abuse and neglect cases. Briefly summarized, these rights include:

Parents

Parents are considered the primary persons designated to raise children in this society, and they should be allowed to do so in an unfettered manner, free from state interference. This right to family privacy is one of the most fundamental in our society. The state may intrude upon the sanctity of the family only under the most compelling circumstances.[6]

State

The state as the ultimate caretaker of its people, has a legitimate interest in protecting the well-being of its citizens. When a child's well-being is seriously threatened by parental action or inaction, the

state, in its role as the ultimate parent, exercises its' parens patriae power to protect the child. The exercise of that power brings the state into direct confrontation with family rights.[7]

Children

Children in a child abuse context are caught in the middle when state and family rights collide. Increasingly, however, children are viewed as having individual rights and interests distinct from either the state or family.[8] As such, more and more states are affording them constitutional due process protections such as the appointment of independent counsel to represent their interests.[9]

4. Definitional Problems Between Legal and Non-Legal Professionals

Child protection necessitates cooperation and coordination between protective services programs and the judicial system. A frequent stumbling block between legal and non-legal professionals has been their varying definitions of child abuse and neglect. Definitions differ because they are the product of differing orientations and values.

Usually, medical and social work definitions are broad in application in an effort to promote early identification and treatment. The following is an example of this type of definition:

> Child abuse and neglect can be broadly defined as those situations (non-accidental) in which a child suffers physical trauma, deprivation of basic physical and developmental needs or mental injury, as the result of an act or omission by a parent, caretaker, or legal guardian.[10]

On the other hand, legal definitions, particularly with regard to termination of parental rights, place more exacting standards on the

evidence required to support an allegation of child abuse or neglect. The Texas statute is illustrative of this point. In order to involuntarily terminate parental rights in a case of alleged neglect, the Texas Family Code (TFC) requires that a two-part test be met: the parent must have...

1) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child and in addition, the court must find that

2) termination is in the best interests of the child [Sec. 15.02(1)(d), TFC].

This statutory standard has taken on added definitional dimensions through case law interpretation. (See Section III(F) of this manual for an overview of termination decisions reviewed by Texas appellate courts.)

B. The Role of the Texas Department of Human Resources in Child Abuse and Neglect

1. The Role as Defined by Law

Legal representation in child abuse and neglect cases requires an understanding of the dominant role the Texas Department of Human Resources (DHR) plays in this area. This role is based on legal authority granted to the Department by various state and federal statutes over the past thirty-eight years. The best source for this information is the Texas Department of Human Resources Social Services Handbook. The following is a summary of DHR's legal responsibilities, as condensed from the Handbook:

Prior to 1941, Texas provided protective services to children, foster care services, and other child welfare services independent of federal laws and funding. Pursuant to the new Human Resources Code,

effective September 1979, the Department of Human Resources is designated as the state agency responsible for administering social service programs established by the Federal Social Security Act. Title II, Subtitle D establishes DHR's authority over Child Welfare and Protective Services programs.

Current services provided by DHR programs are required to be in accordance with services specified in the Social Security Act under 1974 amendments. The 1974 amendments to the Social Security Act created Title XX, Grants to States for Services. In addition to Title XX social services, states must provide certain child welfare services defined under Title IV-B of the Social Security Act. All the services specified in the Social Security Act are interpreted by the U.S. Department of Health and Human Services (formerly Health, Education, and Welfare) through regulations published in the Code of Federal Regulations.

Various other responsibilities are designated to DHR by state statutes:

Chapter 11, Texas Family Code

designates DHR as a resource to courts for completing social studies on the circumstances of suits affecting the parent-child relationship;

Chapter 14, Texas Family Code

allows the court to appoint DHR as managing conservator when it is in the best interests of the child;

Chapter 17, Texas Family Code

allows DHR to make emergency removal of a child to protect the child from abuse or neglect;

Chapter 18, Texas Family Code

requires DHR, as managing conservator of a child, to participate in a court hearing to review the conservatorship appointment and DHR's placement of the child;

requires DHR to file a suit affecting the parent-child relationship whenever a parent voluntarily surrenders the custody,

care, or control of their child to the Department, in order to insure court review of DHR placement; and,

requires DHR to notify the court having continuing jurisdiction whenever the Department returns a child to a parent for custody, care, or control;

Chapter 34, Texas Family Code

allows DHR to receive and investigate child abuse and neglect reports; and,

requires DHR to maintain a Central Registry of child abuse and neglect reports;

Chapter 41, Human Resources Code

authorizes DHR to provide foster family care;

Chapter 47, Human Resources Code

allows state funds to be used as payments for certain children whom DHR places for adoption; and,

Chapter 42, Human Resources Code

requires that DHR's protective services program, as a state agency operating a program for placement of children in institutions, agency homes, or adoptive homes, must be certified by the Licensing Division as a child-placing agency.

2. DHR Family Support Services

DHR offers or coordinates a wide variety of services to improve child care and maintain the family unit. The DHR Social Services Handbook, Section 7241.1, lists a number of examples:

1. Using relatives or unrelated persons to provide services for the family
2. Homemaker services
3. Day Care services
4. Community counseling services
5. Employment and training services
6. Recreation and social programs
7. Public school, home-bound teachers, and tutors
8. Family planning
9. Financial and medical assistance

10. Parent self-help groups
11. Transportation services
12. Mental health-mental retardation services
13. State schools for the blind or deaf
14. Visiting nurses or public health services
15. Legal aid
16. Food stamps
17. Health-related services
18. Housing improvement services
19. Home management instructions and training

(Not all of these services will be appropriate or even available in many instances.)

3. DHR Care of Abused and Neglected Children Outside the Home

Foster care is 24-hour care provided for a child outside his/her home in a foster family home, foster group home, or child-caring institution while the child's parents are unable to care for him.[11] An average of 1,505 children are in the care of state-sponsored foster families in Texas every month. Another 317 children are in foster group homes, and 1,875 are in institutions.[12] Under the Child Care Licensing Act of 1975 [Chapter 42 of the Human Resources Code], DHR's protective services program must be certified as a 24-hour care and adoption child-placing agency by the Licensing Division of DHR. Under the Act, a "child-placing agency" means a person other than the natural parents or guardian of the child who plans for the placement of, or places a child in an institution, agency home, or adoptive home.

Successful foster care placement is dependent upon choosing appropriate facilities for the child.[13] Among the factors DHR takes into account in a foster care placement are (1) the child's individual needs as determined in a foster care intake study; (2) the preparation of a

foster care service plan which would include the expected length of placement; and (3) the facility's location, with a preference that it be close to the placing unit and the child's family.[14] Once a foster home receives a child, the protective services unit which certifies the home is responsible for supervising and providing support services to the foster family; the foster family is responsible for the daily care and nurture of the child.

NOTES TO CHAPTER I

1. National Center on Child Abuse and Neglect. 1977 Analysis of Child Abuse and Neglect Research, (Washington, D.C.: U.S. Government Printing Office (Stock No. 017-091-00223-1), January 1978).

2. American Humane Society and the Center for Social Work Research and Development, Denver Research Institute. National Analysis of Official Child Neglect and Abuse Reporting: An Executive Summary, (Washington, D.C.: U.S. Government Printing Office, DHEW Pub. No. (OHDS) 79-30232, 1979).

3. Helfer, R. and Kempe, H. "Assessing Family Pathology," in Child Abuse and Neglect, The Family and the Community, (Cambridge: Ballenger Publishing Co., 1976).

4. Texas Council of Child Welfare Boards. 1979 Survey of Texas Residents.

5. For conflicting views of the criminalization issue, see:

Rosenthal, M. "Physical Abuse of Children by Parents: The Criminalization Decision," 7 American Journal of Criminal Law 141 (1979); and Schrier, C. "Child Abuse - An Illness or a Crime?" 58 Child Welfare 237 (1979).

6. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Prince v. Massachusetts, 321 U.S. 158 (1944); May v. Anderson, 345 U.S. 528 (1953); Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Parham v. J.R., 422 U.S. 584 (1979); also see: "Developments in the Law: The Constitution and the Family," 93 Harvard Law Review 1156 (1980).

7. By the early nineteenth century, the parens patriae power of the state, i.e., the sovereign's ultimate responsibility to guard the interests of children and others who lacked legal capacity, was thought sufficient to empower courts to remove a child from parental custody. Significantly, the reinforcement of public morality, and not simply the protection of children from cruelty, was seen as sufficient justification for the exercise of this power. Today, every state has a statute allowing a court to intervene into the family to protect a child; this authority is usually conferred on the juvenile or family court.

8. See, e.g., Bricker. "Children's Rights: A Movement in Search of Meaning," 13 Richmond Law Review 661 (1979); Geiser. "The Rights of Children," 28 Hastings Law Journal 1027 (1977).

9. See, e.g., Genden. "Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings," 11 Harvard Civil Rights-Civil Liberties Law Review 565

(1976); Sims v. State Department of Public Welfare, 438 F.Supp. 1179, 1198 (S.D. Tex. 1977), reversed on other grounds, 99 S.Ct. 237 (1979); Alsager v. District Court, 406 F.Supp. 10 (S.D. Iowa 1975), affirmed 545 F.2d 1137 (8th Circuit, 1976); Doe v. Delaware, In the Supreme Court of the United States, October term, 1979 (Civil Docket No. 79-5932), Brief of the National Association of Counsel for Children and the Guardian Ad Litem Program of the District of Columbia, Amici Curiae (June 1980).

10. Child Advocate Association of Chicago. Hospital Guidelines for the Management of Suspected Child Abuse and Neglect Cases, p. 2 (Prepublication as of September 1977).

11. Texas Department of Human Resources. Social Services Handbook, Sec. 7400.

12. 78 Things You Need to Know About Texas Children, The Darker Side of Childhood, Texas Department of Community Affairs Publication (1978).

13. See: Permanent Planning for Children in Foster Care: A Handbook for Social Workers, (Washington, D.C.: U.S. Government Printing Office, DHHS Publication No. (OHDS) 80-30123, Reprinted May 1980).

14. Texas Department of Human Resources. Social Services Handbook, Sec. 7420.5.

CHAPTER II.

SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP IN TEXAS

A. Definitions

The Texas Family Code contains four distinct Titles: Title 1 for marriage and divorce; Title 2 for handling custody, paternity, termination of parental rights, and adoption matters; Title 3 for juvenile matters; and Title 4 for protective orders involving family violence.

As of January 1974, suits affecting family relationships came under the provisions of Title 2, Parent and Child. Subtitle A of Title 2 initiated a new era in Texas family law by establishing a single action, a "suit affecting the parent-child relationship" (hereinafter, SAPCR), which could adequately accommodate the major aspects of a child's welfare, i.e., custody, visitation, support, termination, adoption, and all temporary interlocutory actions.

Title 2 sets out new definitions and new language for handling parent-child matters. No Texas attorney can participate in child abuse litigation without a thorough understanding of these concepts.

1. Defining The Child and the Parent

A "child" is defined as a person under age 18 who has never been married or who has not had the disabilities of minority removed for general purposes; an "adult" is any other person [Sec. 11.01(1), TFC].

"Parent" includes the natural mother, legitimate father, or adoptive mother or father. Specifically excluded are parents whose rights have

been terminated [Sec. 11.01(3), TFC]. The Texas Supreme Court has ruled that the rights of an illegitimate father may be terminated without a showing of unfitness or misconduct under Section 15.02(1), TFC, because he was not a "parent" for purposes of the Family Code [In the Interest of K, 535 S.W.2d 168 (Tex. 1976), cert. denied 429 U.S. 907 (1976); also see, In the Interest of T.E.T., 603 S.W.2d 793 (Tex. 1980)].

2. Defining the Parent-Child Relationship

The parent-child relationship includes: "...the rights, privileges, duties, and powers existing between a parent and child as provided by..." the Family Code [Sec. 12.04(4), TFC]. More specifically, these include: "(1) the right to have physical possession of the child and to establish its legal domicile; (2) the duty of care, control, protection, moral and religious training, and reasonable discipline of the child; (3) the duty to support the child, including providing the child with clothing, food, shelter, medical care, and education; (4) the duty to manage the estate of the child, except when a guardian of the estate has been appointed; (5) the right to the services and earnings of the child; (6) the power to consent to marriage, to enlistment in the armed forces of the United States, and to medical, psychiatric, and surgical treatment; (7) the power to represent the child in legal action and to make other decisions of substantial legal significance concerning the child; (8) the power to receive and give receipt for payments for the support of the child and to hold or disburse any funds for the benefit of the child; (9) the right to inherit from and through the child; and (10) any other right, privilege, duty, or power existing between a parent and child by virtue of law" [Sec. 12.04, TFC].

3. Defining the Suit Affecting the Parent-Child Relationship (SAPCR)

A suit affecting the parent-child relationship is any suit brought under Subtitle A of Title 2 of the Family Code, in which is sought either appointment of a managing conservator, appointment of a possessory conservator, access to or support of a child, or establishment or termination of parental rights [Sec. 11.01(5), TFC]. A suit affecting the parent-child relationship (SAPCR) is the basic legal mechanism in Texas for intervening in cases of alleged child abuse and neglect. By definition, SAPCR refers only to suits filed after January 1, 1974, the effective date of the Family Code [Curtis v. Gibbs, 511 S.W.2d 263 (Tex. 1974)]. The intent to file a SAPCR under this Subtitle will be upheld even if the pleading is inadequate [Rogers v. Rogers, 536 S.W.2d 442 (Tex. Civ. App.-Houston [1st Dist.] 1976, no writ)].

4. Scope of Suit Authorized

A SAPCR is to be brought as provided in Subtitle A of Title 2 of the Family Code.

One or more of the matters covered by the Subtitle may be determined in one suit. The court may, in fact, on its own motion, require the parties to replead so as to bring into one suit all the issues affecting the parent-child relationship [Sec. 11.02(a)(b), TFC]. This is a major innovation in Texas family law, shifting the emphasis from separate causes of action regarding custody, support, paternity, etc., to concentration on the remedy, in furtherance of a general judicial policy to avoid piecemeal litigation.

5. Who May Bring a Parent-Child Suit

Suit may be brought by any person having an interest in the child, including the child (through a representative authorized by the court), a public agency, or authorized private agency [Sec. 11.03, TFC]. A parent whose rights have been terminated does not have standing to bring suit [Glover v. Moore, 536 S.W.2d 78 (Tex. Civ. App.-Eastland 1975, no writ)]. However, see Durham v. Barrell, 600 S.W.2d 756 (Tex. 1980) where the court allowed the mother whose rights had been terminated to initiate a suit as a friend of the child. A foster parent does have standing [Harris Co. Child Welfare Unit v. Caloudas, 590 S.W.2d 596 (Tex. Civ. App.-Houston [1st Dist.] 1979)].

6. Courts With Jurisdiction Over the Parent-Child Suit

The Family Code defines "court" to include a district court, a juvenile court with the jurisdiction of a district court (as distinguished from county courts which are given juvenile jurisdiction), a court of domestic relations, or "other court expressly given jurisdiction of a suit under this Subtitle" [Sec. 11.01(2), TFC]. Article 1926(a), Vernon's Texas Civil Statutes, (effective September 1, 1977), abolished courts of domestic relations and "special juvenile courts" (in Harris and Dallas counties), and in their places established district courts of general jurisdiction known as Family District Courts. This definition of "court" is in accordance with Article V, Section 8 of the Texas Constitution, which grants to district courts "original jurisdiction and general control" over minors [Leithold v. Plass, 413 S.W.2d 698 (Tex. 1967), and Page v. Sherrill, 415 S.W.2d 642 (Tex. 1967)].

B. Introduction to Jurisdiction and Venue[1]

"Jurisdiction" is the power which a court acquires to hear and determine the matter in controversy [Cleveland v. Ward, 116 Tex. 1, 285 S.W. 1063 (1926)]. "Venue" is the correct place where jurisdiction should be asserted. Once a petition is filed, jurisdiction attaches if the matter is within the power of the court to decide [Guillory v. Davis, 527 S.W.2d 465 (Tex. Civ. App.- Beaumont 1975, no writ)].

Where a suit is filed in two Texas courts, both equally competent (i.e., two district courts to hear the matter), "coordinate" jurisdiction occurs [Lutes v. Lutes, 538 S.W.2d 256, 259 (Tex. Civ. App.-Houston [14th Dist.] 1976, no writ)]. The court in which the suit is first filed has "dominant" jurisdiction to determine the matter [Lutes v. Lutes, 536 S.W.2d 418 (Tex. Civ. App.-Houston [14th Dist.] 1975, no writ)]. The other court or courts have "subservient" jurisdiction. Dominant jurisdiction applies to courts of coordinate jurisdiction and not to courts of continuing jurisdiction [Ex Parte Jabara, 556 S.W.2d 592, 596 (Tex. Civ. App.-Dallas 1977, no writ)]. Once the coordinate courts are notified of the conflict, the court which is first in time of filing becomes the court of exclusive jurisdiction unless waiver occurs.

After final judgment in a SAPCR, the court which heard the matter acquires continuing jurisdiction to hear future matters in controversy [Curtis v. Gibbs, 511 S.W.2d 263, 267 (Tex. 1974)].

1. Original Jurisdiction of SAPCR

Section 11.045, TFC (Senate Bill 143, effective August 29, 1979),

establishes the jurisdictional limits of a SAPCR. For original jurisdiction to attach, whether or not the child is physically present in the state, one of the following conditions must be met:

(1) Texas is the child's principle residence when the proceeding is begun; or Texas was the principle residence at any time during the six-month period prior to the proceeding being commenced, and a parent or person acting as a parent resides in the state when the proceeding is begun; or

(2) the child's best interests are served by Texas assuming jurisdiction because:

(a) the child and his parents, or the child and at least one contestant, have significant contact with Texas and substantial evidence exists here concerning the child's present or future well-being; or

(b) a serious immediate question concerning the child's welfare has arisen while the child is physically present in Texas; or

(c) it seems that no other state would have jurisdiction under prerequisites substantially in accordance with Section 11.045, or another state has declined jurisdiction on the grounds that Texas is the more appropriate forum.

Note that Section 11.045(b) states that the mere physical presence of a child in Texas, or of the child and one of the contestants, standing alone, will not confer jurisdiction on the Texas court.

2. Continuing Jurisdiction

The purpose of continuing jurisdiction is to reduce delays caused by disputes over venue arising subsequent to a final order. Once a court has assumed jurisdiction in a SAPCR and entered final judgment, all subsequent actions in the case (motions to modify or enforce, or petitions for further action) must be initiated in the original court. This con-

cept is known as "continuing, exclusive jurisdiction [Sec. 11.05(e), TFC] and vests the original court with sole power until and unless the case is transferred under provisions of Section 11.06, TFC. The judgments and decrees of a court with continuing jurisdiction are final, however, and may be appealed [Campbell v. Campbell, 550 S.W.2d 164 (Tex. Civ. App.-Austin 1977, no writ)]. A court's continuing jurisdiction will end when an adoption decree is entered; any new SAPCR involving that child must be filed as an original petition. In addition, the continuing jurisdiction of a court ends when the parties remarry and then file suit to dissolve the later marriage combined with a SAPCR involving the child [Sec. 11.05(e), TFC].

Section 11.052 of the Family Code places limitations on the exercise of the continuing jurisdiction of the original Texas court. Under Subsection 11.052(1), managing conservatorship may not be modified by a Texas court after the conservator and child have resided out-of-state for six months or more, unless the parties agree or the suit was pending prior to the six-month period. Subsection 11.052(2) expands this prohibition on modification to any part of the decree if all the parties maintain their principal residence out-of-state. The original court does, however, retain its power to enforce its decree and enter judgments on the decree.

Finally, Section 11.053 of the Family Code requires Texas courts to recognize and enforce out-of-state decrees that would have been SAPCR's if initiated in Texas. This directive may be ignored upon a showing that the out-of-state court did not exercise its jurisdiction under statutory authority substantially in accordance with Texas Family Code standards.

3. Venue for the Parent-Child Suit

As previously mentioned, venue is the proper place to have a suit heard. The general venue rule is that a SAPCR is to be brought in the county of the child's residence [Sec. 11.04(a), TFC]. The Family Code thus takes these suits out of the general venue provisions of Article 1995, Vernon's Texas Civil Statutes [Rogers v. Rogers, 536 S.W.2d 442 (Tex. Civ. App.-Houston [1st Dist.] 1976, no writ)]. Four exceptions to the general rule exist: (1) when the SAPCR is in conjunction with a divorce suit, venue for the divorce governs [see Sections 3.55 and 11.06(b), TFC]; (2) when the child is before the court under the emergency removal provisions of Chapter 17 of the Family Code, venue for the emergency hearing rests with any court which has jurisdiction over a SAPCR in the county where the child is found and reverts to the general venue rule for subsequent hearings unless a court of continuing jurisdiction exists elsewhere; (3) an adoption petition may be brought where the child resides, where the petitioners reside, or if the child is placed for adoption by an authorized agency, in the county where that agency is located; and (4) venue for paternity and legitimation proceedings are determined according to Section 13.41, TFC.

Venue facts to be proven under Section 11.04 of the Family Code include a showing that: the suit is one affecting the parent-child relationship; and the child resides in the county where suit is filed. It is not necessary that the cause of action be proven in order to establish venue [Adair v. Patterson, 551 S.W.2d 110 (Tex. Civ. App.-Houston [14th Dist.] 1977)].

To determine the county of the child's residence, the general rule

is the child resides where his or her parents (or parent, if only one is living) reside. Exceptions to the general rule apply if: (1) the child resides where the managing conservator (if one exists) or custodian (if one has been appointed prior to January 1, 1974) resides; (2) the child resides where the guardian of the child's person resides (if no managing conservator or custodian has been appointed); (3) the child resides where the custodial parent resides (if the parents reside in different counties and neither managing conservator nor guardian of the person has been appointed); (4) the child resides where the adult other than the parent who has care and control of the child resides (if an official custodian has not been appointed, cannot be located, or has left the child in the care of another adult); (5) the child resides where the guardian or custodian appointed by a court of another state or nation resides; and (6) the child resides where the child is found (if it is apparent that the child is not under the care and control of any adult) [Sec. 11.04(c), TFC].

C. Transferring the Parent-Child Suit

Section 11.06 of the Family Code replaces the general Plea of Privilege practice found in Texas Rules of Civil Procedure 86-89. Section 11.06 sets out certain situations in which transfer to another court is mandatory, other situations in which transfer is discretionary, and the procedure to be followed in effecting a transfer.[2]

Mandatory Transfers

Transfers must take place under the following circumstances:

(1) If a SAPCR is filed in a court where venue is improper (usually because it is not the county of the child's residence) and no other court has continuing jurisdiction, the court shall, on the motion of any party except the petitioner, transfer the case to the county in which venue is proper [Sec. 11.06(a), TFC].

(2) If a petition to modify a decree in a previous parent-child suit is filed in the court of continuing jurisdiction and there is a showing that the child has had his principal residence in another county for at least six months, the court shall, on the motion of any party, transfer the case to the county where the child resides, and where venue is therefore proper [Sec. 11.06(b), TFC].

(3) If a suit for the divorce of the child's parents has been filed in another county, the court shall, on the motion of any party, transfer the case to that court [Sec. 11.06(b), TFC].

(4) A court which has continuing jurisdiction over a child shall, on the motion of any party or on its own motion, transfer the case if another court has acquired the jurisdiction of a child in a parent-child suit after being erroneously informed by DHR that no court has continuing jurisdiction [Sec. 11.06(d), TFC].

Discretionary Transfers

Transfers may be made at the court's discretion under the following circumstances:

(1) If a petition to modify a decree in a previous parent-child suit is filed in the court of continuing jurisdiction and there is a showing that the child has had his or her principal place of residence in another county for less than six months, the court may, on the motion of any party, transfer the case to the county where the child resides [Sec. 11.06(b), TFC]. This discretion gives the court power to prevent forum-shopping or harassment by the party with custody.

(2) The court may, on the motion of any party, transfer a case to a proper court in any county if such a transfer would be more convenient for the parties and witnesses and would serve the interests of justice [Sec. 11.06(c), TFC].

A motion made under Section 11.06(a), (b), or (c) must be made on or before the answer day [Sec. 11.06(e), TFC]. (Note that Section 11.06(e) is not appropriate in a Section 14.08 Motion to Modify as there is no answer due.) A hearing on the motion to transfer must be held within thirty days of the filing of the motion and each party to the suit must receive ten days notice of the hearing. The only evidence which will be heard at that time is evidence of venue. The order transferring or refusing to transfer the case is not appealable [Sec. 11.06(f), TFC].[3]

The transferring court shall transmit the complete files in "...all matters affecting the child," certified copies of the court's minutes, and a certified copy of any divorce decree if the parent-child suit was joined with a divorce suit. If the transferring court retains jurisdiction of another child who was the subject of the suit, it shall keep the original files and transfer a copy thereof [Sec. 11.06(g), TFC]. The court to which transfer is made becomes the court of continuing jurisdiction [Sec. 11.06(h), TFC].

Effective September 1, 1979, Chapter 17 of the Family Code entitled "Emergency Procedure in Suit by Government Entity" was amended to allow issuance of emergency protective orders by any court with SAPCR jurisdiction, even if another court has continuing jurisdiction status. Once "temporary orders necessary for the protection of the child pending a final hearing" are issued, the government entity (usually DHR) shall determine if a court of continuing jurisdiction exists and must initiate any necessary transfers under Sections 17.06 or 11.06 of the Family Code. If there is a court of continuing jurisdiction, the transfer must be made on a party motion. If no court of continuing jurisdiction exists, the transfer must be to the court having venue of the SAPCR under Section

11.04 of the Code. Any court to which the transfer is made may enforce, by contempt or otherwise, any temporary order properly issued under Chapter 17.

D. Acquiring Jurisdiction Over a Non-Resident

A person who is not a resident or domiciliary of Texas can come under the court's exercise of personal jurisdiction if: (1) the child was conceived in Texas and the person is a parent or an alleged parent or probable father; (2) the child resides in Texas [see Sec. 11.04, TFC] as a result of the acts of or with the approval of the person; (3) the person has resided with the child in Texas; or (4) notwithstanding the foregoing three subdivisions, there is any constitutional basis for exercise of personal jurisdiction [Sec. 11.051, TFC].

E. Citation and Notice of Parent-Child Suits[4]

Once the plaintiff's petition has been prepared and filed, it must be served upon the respondent. This personal service is intended to inform the respondent of the action and to provide a fair opportunity to appear and defend his or her interests. Usually this is accomplished by an officer serving the defendent, in person, with a copy of the petition and a notifying document (the citation) [Texas Rules of Civil Procedure 106]. Citation may also be made by certified registered mail in a suit affecting the parent-child relationship, even if it is a suit to terminate parental rights [see Sec. 11.09(c)(i) and (ii), TFC; and Texas Rules of Civil Procedure 106, as amended]. There are, of course, times when

the personal service method cannot be accomplished. In those instances, an alternative method of citation is authorized. Further, the respondent may waive issuance of citation, thus dispensing with the necessity of service of process.

The various options for service upon a defendant are found in Texas Rules of Civil Procedure 99-124. Where personal service cannot be obtained, two alternate methods of constructive service are provided: (1) service by publication, and (2) substituted service. Also permissible, in lieu of personal or constructive service, are: waiver of process, appearance, or answer.

Once service of citation has been accomplished, Texas Rules of Civil Procedure, Section 21a-b, permits notice of additional pleadings in the case to be made by personal delivery or certified or registered mail to the respondent or his or her attorney. A certificate of service of notice must be filed with the court of record. The exceptions to this rule apply (1) where injunctive relief is sought, and (2) in a show cause hearing for contempt. Both require actual service of notice.

NOTES TO CHAPTER II

1. For an in-depth discussion, see: Nichols, J.F. "Jurisdiction, Venue and Transfers Where All Parties Reside in Texas," in The Advanced Family Law Course Manual, published by the Texas Bar Association (August 1979).

2. The rules regarding answer date for motions to transfer set out in Section 11.06(a), (b), and (c) are confusing. The time allowed for filing a motion to modify under such a proceeding is not specified. Because the transfer hearing must be held within thirty days and the party is entitled to ten days notice, it is possible, through a failure of service, to have "impossibility" commanded by statute. If, for example, it takes twenty-five to thirty days to get service, then you could not have both the ten days notice and the hearing within thirty days of the filing of the motion. There is legislation pending in the Texas Legislature designed to correct this problem. (Conversation with John J. Sampson, The University of Texas Law School, January 20, 1981.)

3. See: Guillory v. Davis, 530 S.W.2d 890 (Tex. Civ. App.-Beaumont 1975, writ dism'd); and Benckenstein v. Benckenstein, 515 S.W.2d 336 (Tex. Civ. App.-Houston [1st Dist.] 1974, writ dism'd).

4. For an in-depth discussion, see: Sampson, J.J. Domestic Relations Manual (obtainable through The University of Texas Law School publications office).

CHAPTER III.

STAGES OF A CHILD ABUSE AND NEGLECT CASE IN TEXAS

A. Texas Legal Process for Child Abuse Cases: An Overview

Legal process in child abuse cases begins in Texas with a report of actual or suspected abuse received by either the Department of Human Resources, an agency designated by the court, or any local or state law enforcement agency. DHR or the court-designated agency must investigate that report and determine if it is valid and, if so, whether legal and/or non-legal action is necessary. When there is an immediate danger to the physical health or safety of the child, a court order may be obtained authorizing emergency removal of the child prior to an adversarial hearing. Even more stringent conditions must be met for an authorized person to remove the child without a court order.

Whether or not there has been an emergency removal of the child, if legal action is sought by the investigating agency, a full adversarial hearing must be initiated. At this time, the court may enter any number of different temporary orders for the protection of the child and rehabilitation of the parents, including placement of the child outside the home. The final step in the process (other than an appeal) is the final hearing on the parent-child suit, at which time an adjudication may be made resulting in termination of parental rights. Once parental rights have been terminated, the Department of Human Resources may arrange for a permanent adoptive home for the child.

B. Child Abuse and Neglect Reporting - Chapter 34 of the Family Code

Unless a family voluntarily seeks help, an investigation for suspected child abuse or neglect generally begins when the Texas Department of Human Resources (DHR), a court-designated agency, or any local or state law enforcement agency, receives a referral [Sec. 34.02, TFC]. "Any person having cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect" is required to report, pursuant to Section 34.02 [Sec. 34.01, TFC]. As long as the informant reports in good faith, he or she is immune from criminal or civil liability [Sec. 34.03, TFC]. The person who "has cause to believe that a child's physical or mental health or welfare has been or may be further adversely affected by abuse or neglect and knowingly fails to report in accordance with Section 34.02" commits a Class B misdemeanor offense [Sec. 34.07, TFC].

Reports received by the local or state law enforcement agency must be referred to DHR or the court-designated agency [Sec. 34.02(c), TFC]. DHR or the agency designated by the court to be responsible for the protection of children shall make a thorough investigation promptly after receiving either a written or oral report [Sec. 34.05(a), TFC]. It should be noted that DHR investigates the vast majority of these cases. This preeminent protective service role by DHR can be explained by the statewide system it operates which receives federal, state, and local funds. Also, DHR operates a statewide child abuse hotline.[1]

The primary purpose of the investigation shall be the protection of the child [Sec. 34.05(a), TFC]. Section 7223 of the Social Services Handbook sets out DHR's investigative responsibilities:

> ...the worker must investigate to determine whether the child needs protective services. The primary purpose of the investigation is to protect the child. The investigation is made in a non-accusatory and non-punitive manner. Protection will be provided for the child when needed.

In conducting an investigation, DHR, or the designated court agency is mandated by Chapter 34 of the Family Code to determine:

1. the nature, extent, and cause of the abuse or neglect;
2. the identity of the person responsible for the abuse or neglect;
3. the names and conditions of the other children in the home;
4. an evaluation of the parents or persons responsible for the care of the child;
5. the adequacy of the home environment;
6. the relationship of the child to the parents or persons responsible for the care of the child; and
7. all other pertinent data [Sec. 34.05(b), TFC].

Also included in the investigation is a visit to the child's home, a physical examination of all the children in that home, and an interview with the subject child. It may include a psychological or psychiatric examination. (Note the importance of obtaining a release for possible testimony; see Chapter IV.B(1) below.) A court order may be obtained on cause shown to allow entrance for the interview, examinations and investigation. Where a court order is sought by DHR, the parents are entitled to notice and a hearing [Sec. 34.05(c), TFC].

Section 34.05(e) of the Family Code requires the investigator to make a written report. If sufficient grounds for the initiation of a suit affecting the parent-child relationship are found, the report, together with its recommendations, shall be submitted to the juvenile court or the district court, the district attorney, and the appropriate

law enforcement agency. Subsequent to receipt of the report, the court may direct the investigator to file a petition under Subtitle A of Title 2 of the Family Code [Sec. 34.05(e), TFC].

The reports, records, and working papers used or developed in the investigation are confidential [Sec. 34.08, TFC]. DHR must establish and maintain a central registry of reported and validated cases of child abuse and neglect [Sec. 34.06, TFC]. The system set up by DHR is called Child Abuse and Neglect Reporting and Inquiry System (CANRIS). Only authorized DHR staff may have access to this system.[2]

The reporting statute also eliminates all privileged communications in any proceeding regarding admission of evidence in the abuse or neglect of a child, or the cause of any abuse or neglect, except in the case of communication between attorney and client [Sec. 34.04, TFC]. (Note a possible exception, however, in the discussion of Article 5561(h), V.T.C.S. in Chapter IV.B(1) below.)

C. Emergency Protection of the Child

As of September 1, 1979, Texas has a new Chapter 17 in the Family Code entitled "Emergency Procedure in Suit by Governmental Entity." This new Chapter is a direct result of a three-judge Federal Court ruling declaring most of the original Chapter 17 to be unconstitutional [Sims v. State Department of Public Welfare, 438 F.Supp. 1179 (S.D. Tex. 1977)]. The U.S. Supreme Court recently reversed that decision on abstention grounds [99 S.Ct. 237 (1979)]. Subsequently, the 66th Texas Legislature completely revised the emergency chapter.[3]

The new Chapter 17 provides two methods for summary pick-up of a

child by a government entity (defined as the state, a political subdivision of the state, or an agency of the state [Sec. 11.01(a), TFC]): (1) obtaining a prior court order authorizing the seizure [Sec. 17.02, TFC], or (2) taking possession of the child without a court order where a dire emergency exists [Sec. 17.03, TFC].

The first method, a prior court order, requires to the satisfaction of the court, a sworn petition or affidavit to the effect that:

(1) there is an immediate danger to the physical health or safety of the child; and

(2) there is no time consistent with the physical health or safety of the child, for an adversarial hearing.

Note that the requirement to demonstrate the lack of time for a hearing makes the court-ordered pick-up the preferred method of emergency removal. The temporary restraining order or attachment of the child issued may not extend for more than ten days.

The second method, possession without a court order, is permitted by an authorized representative of DHR, a law enforcement officer, or a juvenile probation officer under the following conditions, and no other:

(1) discovering the child in a dangerous situation to his physical health or safety and the sole purpose is to deliver the child without unnecessary delay to the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian who is presently entitled to possession of the child;

(2) upon the voluntary delivery of the child by the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian who is presently entitled to possession of the child;

(3) upon personal knowledge of facts which would lead a person of ordinary prudence and caution to believe that there is an immediate danger to the child's physical health or safety and that there is no time to obtain a temporary restraining order or attachment under Section 17.02 of the Family Code; or

(4) upon information furnished by another which has been corroborated by personal knowledge of facts and all of which taken together could lead a person of ordinary prudence and caution to believe that there is an immediate danger to the physical health or safety of the child and that there is not time to obtain a temporary restraining order or attachment under Section 17.02 of the Family Code.

When this method occurs, the statute requires a hearing, which may be ex parte, to be held no later than the first working day after the child is taken into possession. If the court is unavailable, the hearing may be held up to the third working day following the removal, but no later. Failure to hold the hearing within the prescribed time limits forces the child to be returned to the person legally entitled to possession. A full adversarial hearing must be held within ten days after taking the child into possession [Sec. 17.03(e), TFC].

Orders for emergency protection may be issued by a court with jurisdiction to hear suits affecting the parent-child relationship in the county in which the child is found, irrespective of continuing jurisdiction rules of Section 11.05 of the Family Code [Sec. 17.05(a), TFC].

D. Court Action Pending Final Hearing in a Suit Affecting the Parent-Child Relationship

1. Temporary Court Orders

Once a district court has assumed jurisdiction over a SAPCR matter initiated by a petition, DHR will be attempting to intervene into the family in order to protect the child pending a final hearing and disposition. Irrespective of Chapter 17 emergency procedures, the proceeding seeking temporary orders usually will be the first opportunity

for a full adversarial hearing for all the parties. At this hearing, the court may make important dispositional decisions which will place certain legal obligations on the parties until the suit comes to final adjudication. But note that no specific finding of child abuse or neglect is made under Texas temporary orders pending a final hearing, although such may be implied by the decision to remove the child.

Under Section 11.11 of the Family Code, "the court may make any temporary order for the safety and welfare of the child, including, but not limited to, an order:

(1) for the temporary conservatorship of the child;

(2) for the temporary support of the child;

(3) restraining any party from molesting or disturbing the peace of the child or another party;

(4) taking the child into possession of the court or of a person designated by the court; or

(5) attaching the body of the child or prohibiting a person from removing the child beyond the jurisdiction of the court as under a writ ne exeat."

The rules governing temporary restraining orders and temporary injunctions in civil cases generally govern Section 11.11 temporary orders. (These rules are found in Rule 680, Texas Rules of Civil Procedure.) Section 11.11 of the Family Code gives broad discretionary authority to the court to issue temporary orders in a suit affecting the parent-child relationship.

Determining the standards which Texas courts apply to temporary hearings is difficult, if not impossible. Other than the broad statutory authority that "the court may make any temporary order for the safety and welfare of the child," no guidance is available since these orders are interlocutory and are, thus, non-appealable [Carpenter v. Ross, 534

S.W.2d 447 (Tex. Civ. App.-Beaumont 1976, no writ)]. We can only observe that courts will be cautious and conservative when a child's welfare is in question.

The court can exercise wide latitude in issuing orders which affect custody, visitation, support, and rehabilitative efforts. Some of the possible alternatives are:

(1) Dismiss petition; leave status quo of family.

(2) Leave status quo of family; petition remains in effect.

(3) Grant temporary managing conservatorship to DHR; grant temporary possessory conservatorship to parents or allow visitation at DHR's discretion.

(4) Grant temporary managing conservatorship to DHR and place possession of the child with a parent, a relative or other interested person.

(5) Not grant temporary managing conservatorship with DHR but order continued contact with the family for purposes of supervision and monitoring.

(6) Grant temporary managing conservatorship to DHR for similar purposes of number 5 above.

(7) Order child support by the parents if the child is placed in DHR care.

(8) Order a social service treatment plan for the parents' rehabilitation.

(9) Order the parent to submit to psychiatric or psychological exams.

(10) Order a social study into the circumstances of the family.

2. Supportive Services for the Family Unit

An asserted right to supportive services from the state to rehabilitate the family prior to termination has been raised by an increasing number of attorneys for parents in termination cases. The alleged right

to these services may be argued on at least three different grounds:

(1) The state statute or state regulations express a desire to rehabilitate families where possible. The new Chapter 18, Texas Family Code gives the court authority on review of a foster placement hearing "to order the Texas Department of Human Resources to provide services to ensure that every effort has been made to enable the parents to provide a family for their own children" [Sec. 18.06(5), TFC].

(2) Federal statutes under which states receive funds require the provision of certain services. The DHR Social Services Handbook states that the Department must meet certain goals of Title XX, Social Security Act, including "preventing or remedying neglect, abuse, or exploitation of children... or preserving, rehabilitating, or reuniting families" (see: Social Security Act, 24 U.S.C. Secs. 601-610).

(3) Sociological and psychological research indicates that children suffer damage when removed from their families.[4]

In a recent case, a Texas court rejected the argument that it could not terminate the parent's rights before allowing the mother to participate in a six-month rehabilitation program as recommended by the examining psychologist. The parent had alleged a fundamental right under the U.S. Constitution to a natural parent-child relationship and claimed that the trial court erred because a less onerous and less restrictive alternative (counseling to change her behavior) existed [In the Interest of G.M., 580 S.W.2d 65 (Tex. Civ. App.-Amarillo 1979, no writ available)]. However, the lower court's ruling was reversed by the Texas Supreme Court [596 S.W.2d 846 (Tex. 1980)] on the basis that the clear and convincing evidence standard was not met (see the discussion on Standard of Proof in Chapter IV, Part B below).

In another recent case, the mother, on appeal, alleged that the state failed to show that termination of parental rights was the least drastic alternative for fulfilling the state's interest in protecting the

children and strengthening the family. The court affirmed the termination of parental rights stating that, "The State attempted to assist the (mother) by providing access to every possible resource and service organization available in order to provide services, assistance, instructors and monitoring" [Sanchez v. Texas Department of Human Resources, 581 S.W.2d 260 (Tex. Civ. App.-Corpus Christi 1979)]. Implicitly then, the court recognized some duty on the part of the state to provide services, but felt that the facts of this case did not fit the mother's claim.

Finally, the 66th Legislature enacted a new Chapter 18, Review of Placement of Children Under the Care of the Department of Human Resources, effective August 27, 1979 (see Appendix B). That Chapter allows the court, at the conclusion of a placement review hearing, to order, in the best interests of the child, "the Texas Department of Human Resources to provide services to ensure that every effort has been made to enable the parents to provide a family for their own children" [Sec. 18.06(5), TFC]. While this section does not establish a right to services for parents, it does provide support for the argument that services should be made available to parents who are willing and able to benefit from them. Of course, supportive services may not be appropriate in cases in which the parents refuse to cooperate in service delivery or the parents are unable to take advantage of the service due to mental incapacity. However, unavailability of services may not be a sufficient reason, if the state has the duty to provide them.

3. Some Practical Considerations for the Adversaries

In some instances, the "temporary" status of an order proves to be

an illusion. For numerous reasons including parental location, identification and service of citation, parental rehabilitation efforts, child welfare worker turnover, attorney delaying tactics, and crowded court dockets, the temporary order frequently lasts for a year or more before the case reaches a final judicial determination.

Given these delays, which often leave the child in the legal limbo of foster care, the parents in a position of confusion and helplessness, and the state in a legal quagmire which hampers purposeful planning for the child and the family, the ancillary hearing becomes a crucial stage in the legal process of these cases. The chief adversaries, the state agency and the parents, require insightful advice from their legal representatives at this point.

In addition to the attorneys for the parents and the state, appointment of an attorney ad litem for the child is mandatory in suits to terminate parental rights. Depending upon the age and maturity of the child, the attorney ad litem may represent the child's wishes regarding custody and/or the attorney's own assessment of what is in the child's best interests.[5] The attorney ad litem should conduct an independent investigation of the case, review all pertinent law and court pleadings, and attend all staffings and case conferences related to the child. At trial, he or she should be actively involved in ferreting out all of the relevant facts by cross-examining witnesses, calling witnesses, and making opening and closing statements when appropriate. At disposition, the attorney ad litem should present the Judge with all available dispositional options. In general, the attorney for the child should determine, with whatever assistance the child can give, what course of action will be best for the child and vigorously advocate for that position,

both in court and with the family's caseworkers and treatment professionals.

Child welfare personnel and their attorneys should carefully consider the necessity for court intervention. The usual tendency of the agency mandated to protect children is to move to intervene through court action when their investigation indicates a home situation bordering on minimally acceptable levels of care. The courts often are inclined to support this position by agreeing to remove the child(ren). Because the order is presumed to be temporary, a sense of protection is conveyed by the removal, when in fact, it may prove detrimental to the child.[6]

While the parent's attorney is ethically bound to represent the wishes of the client at this hearing, the attorney must also consider whether this is the proper time for the client to assume an unyielding position about keeping the children in the home. Careful evaluation of the client's ability to care and provide for the children must be undertaken. Can the parent make necessary changes which will convince the agency that further court action is unnecessary? Can those changes be accomplished with the children remaining at home? Are these changes necessary or specious demands by the child welfare agency? Can the agency realistically offer services to aid the parent in achieving change? Will the parent agree to the court plan? All of this information must be gathered and evaluated and presented to the parent in order to allow that parent to make an informed decision about whether to object or agree to the temporary orders requested by the agency.

Where the choice is made to remove the child from the home and the parents resist, a reasonable likelihood exists that a full adversarial hearing, often acrimonious, will ensue. A primary reason for the

adversarial hearing is that the parents refuse to voluntarily relinquish custody to the state agency. A second reason concerns the desire of the defense attorney's to obtain, at this time, as much information about the state's case as possible. Thirdly, the issues require that medical experts be called in to testify on the physical or emotional harm suffered by the child. Finally, these hearings have increasingly become the setting in which the parents are informed of the seriousness of the charges and the changes they must make in order to regain custody. A full airing of the evidence, including charges and counter-charges, will ensue.

E. Judicial Monitoring of the State Foster Care System

Over the past few years, foster care systems in all states have come under heavy criticism:

> Recent estimates indicate that there are 350,000 children in foster care on any given day - about half of them 10 years or older. Although foster care ordinarily is meant to be a short-term solution to an emergency situation, foster children spend more than four years in care, according to estimates of the national average. Some 24 percent of the children who enter foster care in any one year - and close to 50 percent of current caseloads - will remain in foster care for long periods, often until they reach adulthood.[7]

As an aid in remedying the excessive use of long-term foster care, the Legislature amended the Family Code by adding Chapter 18, Review of Placement of Children Under the Care of the Department of Human Resources, effective Augsut 27, 1979. (For a review and commentary on Chapter 18, see Appendix A.)

The new Chapter 18 is designed to monitor the status of foster

children who are under the managing conservatorship of DHR. It is intended to prevent the "drift" of children in the foster care bureaucracy, where many have spent considerable periods of their minority.

Periodic review, not earlier than five and one-half months and not later than seven months after the date of the last hearing involving the child, is mandated for all cases in which DHR has been named the managing conservator. Any party, for good cause shown, may obtain an earlier hearing if approved by the court. Chapter 18 applies to all DHR conservatorships, whether voluntary or involuntary, and whether the child is in a foster family home, a group home, or institutional care. The court must be notified if the child has been returned to the parents, but no review is required. In all other instances, a full hearing with notice to all interested parties (including the foster parent or director of the group home or institution where the child is residing) and an opportunity to present evidence is required.

The new federal Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272 (signed into law on June 17, 1980), creates added financial incentives for the states to reduce the length of time children spend in temporary foster care. Title I of the Act, Foster Care and Adoption Assistance, establishes a new Title IV-E to the Social Security Act for federal payments for adoption assistance and foster care, replacing the current Title IV-A. States are required to establish by law, by October 1, 1982, for each fiscal year beginning with fiscal year 1983, goals as to the maximum number of children in the state who will remain in foster care after having been in such care for over twenty-four months. The Act also increases the protections for children in foster care by specifying the contents of case plans and requiring administrative or judicial

review of cases at least every six months. Effective October 1, 1983, in the case of children involuntarily removed from their homes by court order, the order would have to include a determination that reasonable efforts had been made to prevent removal, in order for the child to receive Title IV-E assistance payments.

Under present law, federal AFDC matching funds are not available for children placed in foster care without a judicial determination. Provisions of the new Act will permit federal matching of expenditures (under a new Title IV-E made after September 30, 1980 and before October 1, 1983, and under the existing Title IV-A of expenditures made after September 30, 1979 and before October 1, 1983) for foster care maintenance payments with respect to a child removed from home pursuant to a voluntary placement agreement. However, federal matching would be available only for expenditures made after the state had implemented the protections and procedures required for receipt of additional matching funds under Title IV-B, also amended by P.L. 96-272. These include a statewide information system for tracking the status of every child in foster care, a system for case review, and a service program to aid children to return to their original families or be placed for adoption. The case review system must include: a case plan designed to achieve placement in the least restrictive (most family-like) setting available and in close proximity to the parents' home (consistent with the best interests and special needs of the child); a review of each child's status, no less frequently than once every six months, to, among other things, project a likely date by which the child may be returned to the home or placed for adoption; and procedural safeguards, including a dispositional hearing to determine the child's future status no later than eighteen months after the original

placement.

For those children who are not eligible for AFDC-sponsored foster care, state funds are available. According to Section 41.021 of the Human Resources Code, to be eligible for solely state-funded foster care, DHR must be the managing conservator and the court order must be based upon pleadings which, at least in the alternative, have asked for termination of parental rights.

F. Managing Conservatorship

"Managing conservatorship" replaces the previous legal term, "custodian". This court-created status endows a non-parent receiving it with parent-like responsibilities. The rights, privileges, duties, and powers of a managing conservator who is not a parent are set out in Section 14.02 of the Family Code.

In any suit affecting the parent-child relationship, the court may appoint a managing conservator, who must be a suitable competent adult, a parent, or an authorized agency [Sec. 14.01(a), TFC]. There is a statutory presumption in favor of a parent being appointed as managing conservator unless the court determines this would not be in the best interests of the child [Sec. 14.01(b), TFC].

Managing conservatorship is sometimes used instead of termination of parental rights where the intention is to work with the family toward rehabilitation and eventual return of the child. Managing conservatorship is usually sought when the child's home is presently unsafe, but an adoptive or relative's home is not appropriate. Because a managing conservatorship may be modified and is, therefore, not final in nature,

the parties may enter into an agreed order [Sec. 14.06, TFC]. Managing conservatorship is often an effective alternative to termination of parental rights and may contribute to a more constructive atmosphere in which to deliver family services.

G. Termination of the Parent-Child Relationship

Introduction

Termination proceedings may be initiated for a variety of reasons, including:

(1) to place a child for adoption after an affidavit of relinquishment has been signed;

(2) to permit one parent to terminate the other parent's rights in cases of abandonment, abuse, neglect, or failure to support; or

(3) to permit the state agency to seek a new home for the child in cases of abandonment, abuse and neglect.

Texas Family Code, Chapter 15 provides for the voluntary and involuntary termination of parental rights. This Chapter recognizes that the parent-child relationship is a protected legal institution which requires judicial action to sever it. While Section 15.01 allows a parent to voluntarily petition for the termination of his or her rights to the child, the vast majority of termination cases are brought under Section 15.02, the involuntary proceeding. Because Section 15.01 is a voluntary action, the only requirement for termination of parental rights is that it be in the child's best interests. Section 15.02, however, requires a dual finding that the parent has engaged in specific conduct or has executed an affidavit of relinquishment and that termination is in

the best interests of the child.

Before examining the substantive sections of Chapter 15, a few important principles as to the nature of a termination suit should be kept in mind. A termination proceeding is a SAPCR and is governed by the provisions of Chapter 11 of the Family Code (as discussed above). A termination proceeding refers only to termination of the rights of a "parent" as defined by the Family Code. The term parent, as defined, does not include the father of an illegitimate child unless the father has legitimated the child by following the procedures established in Chapter 13 of the Family Code.[8] A child is always legitimate as to its mother.

Section 15.02, Involuntary Termination of Parental Rights

Section 15.02 provides for the involuntary termination of parental rights. A suit under this Section may be brought by a state agency, a parent, or any other individual with an interest in the child. With the exception of Section 15.02(1)(K) which calls for an affidavit of relinquishment of parental rights, Section 15.02(1)(A-J) requires a showing of fault or an inability to care on the part of the parent. In addition to a finding under Section 15.02(1)(A-K), the court must further find that termination is in the "best interest" of the child. To reiterate, the termination burden is a dual one, i.e., a specific ground must be proven and a showing that termination is in the child's best interests must be made.

Under Section 15.02, a petition requesting termination of the parent-child relationship, with respect to a parent who is not the

petitioner, may be granted if the court finds:

(1) That the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return;

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;

(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months;

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;

(F) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition;

(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identification cannot be ascertained by the exercise of reasonable diligence;

(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child and remained apart from the child or failed to support the child since the birth;

(I) contumaciously refused to submit to a reasonable and lawful order of a court under Section 34.05 of the Family Code (requiring an investigation of possible child abuse);

(J) has been the major cause of:

(i) the failure of the child to be enrolled in school as required by the Texas Education Code; or

(ii) the child's absence from his home without the consent of his parents or guardian for a substantial length of time or without the intent to return; or

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by Section 15.03 of the Family Code (discussed below);

and termination is in the best interests of the child.

Sections 15.02(1)(A), (B), and (C), Abandonment

Sections 15.02(1)(A), (B), and (C) include the various fact situations which constitute abandonment. A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds:

(1) That the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return.

This Subsection specifies abandonment when a parent leaves the child alone or with a non-parent and expresses an intent not to return. No specific length of absence from the child need be proved.

The expression of intent not to return must be unequivocal. In In the Interest of E.S.M., 550 S.W.2d 749 (Tex. Civ App.-Houston [1st Dist.] 1977, writ ref'd n.r.e.), the court found a jail-bound mother's oral agreement with a family with whom she placed her infant child that she would regain custody if she "straightened out her life" to be equivocal.

In Ervin v. Wichita County Family Court Services, 553 S.W.2d 947, 950 (Tex. Civ. App.-Fort Worth 1978, no writ), the court found that "all of the evidence offered at the hearing was to the effect that the mother expressly stated at the time she left her children that she was going to return for them." Hence, the evidence was insufficient to sustain a finding under Subsection (1)(A) of Section 15.02.

> (B) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return.

Subsection (B) is established when the parent leaves the child alone or with a non-parent for a period of three months, without making provisions for the child's support and without expressing an intent to return.

To support this finding, there must be evidence that the parent did not express an intent to return. In Schiesser v. State, 544 S.W.2d 373 (Tex. 1976), no testimony was offered which related in any way to the subject of whether or not (the mother) expressed an intent to return, which meant that Subsection (B) was not satisfied.

In the Interest of E.S.M., 550 S.W.2d 749 (Tex. Civ. App.-Houston [1st Dist.] 1977, writ ref'd n.r.e.) shed light on the meaning of the phrase "remained away for a period of at least three months." In that case, the mother had served time in jail and the court said it could not determine "from a preponderance of the evidence that the mother remained away from the child for a period of at least three months when she was free to be with him" (at p. 756; emphasis added).

Another case, Brokenleg v. Butts, 559 S.W.2d 853 (Tex. Civ. App.-El Paso 1977, writ ref'd n.r.e.), found that the issue in this Subsection was not the appellant's ability to support the child, but whether she made adequate provision for support, which she did by leaving the child

with grandparents. (Refer to 15.02(1)(F) regarding termination grounds for failure to support within one's ability.)

> (C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months.

Subsection (C) was expanded in 1979 to cover the abandonment situation in which the parent has voluntarily left the child alone or in the possession of another (parent or otherwise) for six months or more without providing adequate support. Note that Subsection (C) differs considerably from the non-support Subsection, 15.02(1)(F), by employing a much shorter time period (six months) for voluntarily leaving the child. The non-support is not tied to an ability to pay as in 15.02(1)(F), but such a requirement will probably be implied by the courts. It should also be noted that 15.02(1)(C) fails to mention any statement by the parent of intent or non-intent to return as Subsections (A) and (B) do. Whether 15.02(1)(C) now covers the situation for which it was originally intended - leaving the child with a non-parent, promising to return, but failing to do so - is open to argument.

The new Subsection (C) can be reconciled with Subsection (F) in that (C) addresses the situation wherein the parent has voluntarily left the child, while (F) is primarily aimed at the parent who fails to pay child support orders following some court action. Thus, the one-year time period applies in (F) to those situations in which the parent did not voluntarily leave, e.g., through loss of custody following a divorce decree.

Section 15.02(1)(D), Knowing Neglect

> (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endangered the physical or emotional well-being of the child.

Subsection (D) reflects the legislative intent to protect a child in the situation where a parent knowingly neglects the child by allowing him or her to remain in conditions or surroundings resulting in physical or emotional harm. Since the Family Code took effect in 1974, the largest number of termination appeals have involved either this Subsection or 15.02(1)(E).

The trial court in In the Interest of Sneed, 592 S.W.2d 430 (Tex. Civ. App.-Fort Worth 1979), ordered termination of both parents' rights to their child because of lack of proper child care. The court further found that the "lack of care... was not through malice nor carelessness nor disregard, but through ignorance." The termination order was affirmed on appeal despite the mother's claim that the poor care was not "knowingly done." The appellate court ruled that the defense of ignorance was insufficient to negate the finding that the parents allowed the child to remain in intolerable conditions.

Insufficient evidence existed in Schiesser v. State, 544 S.W.2d 373, 378 (Tex. 1976), to support the state's contention that the mother's failure to provide a home for the children, which forced them to live in state-supported foster care, endangered their emotional well-being. The court in that case ruled that the mere fact of foster care without some showing of causal relationship between emotional disturbance of the children and the living arrangement (foster care) cannot, standing alone, prove emotional damage.

Two cases speak to the issue of whether parental imprisonment results in physical or emotional harm to the child under this Subsection. In H.W.J. v. State Department of Public Welfare, 543 S.W.2d 9, 11 (1976, no writ), the Texarkana Court of Civil Appeals stated that "...imprisonment of and by itself, (would not) constitute the conduct described by Subparagraphs (D), or (E), of Section 15.02(1); but if such imprisonment is the result of, or is coupled with, a voluntary, deliberate and conscious course of conduct which has the effect of placing or allowing the children to remain in conditions which endanger their physical or emotional well-being, a finding under Subparagraphs (D) and (E) may be justified."

In Crawford v. Crawford, 569 S.W.2d 505 (Tex. Civ. App.-San Antonio 1978, no writ), one parent sought to terminate the rights of an imprisoned parent. The court's ruling supports dictum in H.W.J. that incarceration alone is not enough to meet the conditions of Subsection 15.02(1)(D), but combined with other evidence is sufficient to support termination. In a more recent case, In the Interest of S.D.H., 591 S.W.2d 637 (Tex. Civ. App.-Eastland 1979), the court specifically stated that imprisonment alone does not constitute abandonment of a child. The father in that case was in prison at the time of the child's birth. The court therefore maintained that even if a criminal offense could be considered a voluntary act of abandonment of someone, this could not be found to be an act of abandonment of anyone not yet born. However, the court in Brazier v. Brazier, 597 S.W.2d 442 (Tex. Civ. App.-Beaumont 1980), terminated the parental rights of a father sent to prison for life. The termination was based on non-support [Sec. 15.02(1)(F), TFC] as he had failed to support the children during the time he was out of prison and working, and when he was incarcerated and receiving funds as gifts prior to his life sentence.

The lower court in Moreland v. State, 531 S.W.2d 229, 235 (Tex. Civ. App.-Houston [1st Dist.] 1975, no writ), terminated parental rights in two younger children, ages 9 and 4, while the two older children, ages 13 and 15, were allowed to remain in the possession of their parents. The Court of Civil Appeals affirmed the lower court ruling and in so doing disagreed with the appellant's view that "it is inconsistent to find that the surroundings endanger the well-being of two children and not the others." The appellate court maintained that "the trial court could accept the (expert) opinion testimony that the older children had passed their development stages and the testimony that having two less children in the family markedly improved the prospect that the parents could control those in their care."

In B.J.M. v. Moore, 582 S.W.2d 619 (Tex. Civ. App.-Dallas 1979), the mother claimed that DHR failed to produce evidence that she "knowingly" neglected her children given the fact that she was mentally retarded, thereby lacking the requisite intent. The court affirmed the termination stating that, "we cannot assume that a person with the mental capacity of a six-year old is incapable of knowledge that the conditions under which small children are living are dangerous to their physical and emotional well-being."

Section 15.02(1)(E), Aggressive Behavior

> (E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child.

As Higgins v. Dallas County Child Welfare Unit, 533 S.W.2d 121 (Tex. Civ. App.-Houston [14th Dist.] 1976, no writ), points out, the Legislature

intended Subsection 15.02(1)(E) to mean something more than neglect, namely, aggressive behavior toward a child resulting in physical or emotional harm.

Texas courts are divided over whether the conduct must be committed in the presence of the child. One court has held that the conduct (violent acts) must be committed in the child's presence, although it was not necessary that they be directed toward the child or that the child actually suffer injuries, as long as the conduct endangers the child's physical well-being. [Lane v. Jefferson County Child Welfare Unit, 564 S.W.2d 130 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.)]. However, in In the Interest of B.J.B. and C.E.B., 546 S.W.2d 674 (Tex. Civ. App.-Texarkana 1977, writ ref'd n.r.e.), the court ruled that the influence of the father's conduct on the children is the test and that the conduct does not have to be in their presence. While expert testimony was heard that the parent's conduct, i.e., fatally stabbing the mother, was reasonably calculated to endanger the physical or emotional well-being of the minor children, the appellate court noted that expert opinion was not indispensable since the trial judge could "reasonably have concluded from common knowledge and experience that the fears and anxieties exhibited by the children following the stabbing evidenced emotional damage...."

In Carter v. Dallas County Child Welfare Unit, 532 S.W.2d 140, 142 (Tex. Civ. App.-Dallas 1975, no writ), the court ruled that Section 15.02(1)(E) does not require intent on the part of the parent "to engage in conduct which endangers the child's physical or psychological well-being." That court also pointed out that although mental incompetence or mental illness alone is not grounds for termination, where the parent's mental state allows or forces him to engage in conduct which endangers

the physical or emotional well-being of the child, then that conduct is evidence which bears upon the advisability of terminating the parent-child relationship.

Another case, T.D.E. v. Christian Child Help Foundation, 550 S.W.2d 101 (Tex. Civ. App.-Houston [14th Dist.] 1977, writ ref'd n.r.e.), held Section 15.02(1)(E) to be applicable when the father caused the mother to become pregnant and abandoned her, even though he did not know she was pregnant. Medical testimony in that case showed that a fetus may suffer from conduct directed at its mother during gestation. The evidence indicated that damage actually was done to the child because of the mother's anxious and depressed condition, and that the father's conduct (causing pregnancy and abandoning her) was responsible. (Compare this finding with the requirements of Section 15.02(1)(H) which allows for termination if the abandonment is with knowledge of the pregnancy.)

Section 15.02(1)(F), Failure to Support

> (F) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition.

Subsection (F) applies when a parent fails to support the child for a one-year period commensurate with his or her financial ability, and a petition is filed within six months of the end of that year.

In Wiley v. Spratlan, 543 S.W.2d 349 (Tex. 1976), the Texas Supreme Court offered some insight into the meaning of the required "one-year period." The Court seemed to reason that it must be a consecutive twelve-month period in which the parent was able to support yet made no payments. Hence, Ms. Wiley, who made three payments during the year, which were

within her ability, avoided the statutory period and the termination was reversed and rendered. This determination may be better understood in light of the dissent which asked rhetorically, "Does the majority intend to hold that if a parent fails to make any support payments for eleven months and succeeds in forwarding a financial contribution on the twelfth month, that the running of the one-year period of non-support has been tolled and termination may not be allowed?" Apparently, the answer is yes.

In the Interest of Laura Diane Jones, 566 S.W.2d 702 (Tex. Civ. App.-Tyler 1978 ref'd n.r.e.), supports the conclusion in Wiley v. Spratlan that the one-year period means twelve consecutive months in which a parent failed to provide support in accordance with his ability.[9]

In McGowen v. State, 558 S.W.2d 561 (Tex. Civ. App.-Houston [14th Dist.] 1977, writ ref'd n.r.e.), the parents were under a court order to pay child support. While the facts showed that they did not have the ability to support their children during part of the one-year period, at other times during the year they did possess the ability to support. Inability to provide support during some months will not interrupt the running of the one-year period, if no effort is made to pay support during those months in which an ability to support is present.

The court in In the Matter of Gilmore, 559 S.W.2d 879, 882 (Tex. Civ. App.-Tyler 1977, no writ), held that a finding pursuant to Subsection (F) is not reversible where the parent asserts on appeal that he is now employed and able to support the child.

In Holley v. Adams, 544 S.W.2d 367 (Tex. 1976), the Texas Supreme Court found adequate evidence to support a lower court's order of termination based on Subsection (F); nevertheless, the Court considered the

circumstances of the divorce (the mother voluntarily gave up her child to assure that he would be provided adequate financial support) as an adequate excuse for her failure to support when it considered the best interests of the child (see the discussion of the Best Interest test, Section 15.02(2), below).

In light of the above cases, the requirement that a petition be filed "within six months of the end of the one-year period" may be conceptualized by referring to the chart below.

	1	2	3	4	5	6	7	8	9	10	11	12
1976												
1977		X			X		X					
1978												

X = payment made within parent's ability to pay

EXAMPLE #1 If a petition is filed anytime within the first seven months of 1977, the statutory requirements for termination are met.

EXAMPLE #2 If a petition is filed during the eighth month of 1977, the termination requirement is not met because the one-year period without a payment has not been fulfilled.

EXAMPLE #3 But a filing in the last six months of 1978 will fulfill the statutory requirement.

Section 15.02(1)(G), Doorstep Abandonment

> (G) abandoned the child without identifying the child or furnishing means of identification, and the child's identification cannot be ascertained by the exercise of reasonable diligence.

Subsection (G) provides for the "doorstep" abandonment situation where an unidentified child is left in the care of the public and no feasible means exist to discover the identity of the child or its parents.

Section 15.02(1)(H), Abandonment of Woman With Knowledge of Pregnancy

> (H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child and remained apart from the child or failed to support the child since the birth.

When the father who has knowledge of the mother's pregnancy voluntarily abandons her without providing adequate support or medical care and remains apart from the child and fails to support the child after birth, Subsection (H) applies. This situation should be distinguished from T.D.E. v. Christian Child Help Foundation, 550 S.W.2d 101 (Tex. Civ. App.-Houston [14th Dist.] 1977, writ ref'd n.r.e.), in which the father did not have knowledge of the pregnancy. In that case, Subsection (E), "engaging in conduct detrimental to the child's emotional and physical well-being," was used to terminate the parent-child relationship (see discussion above).

Section 15.02(1)(I), Refusal to Submit to a Section 34.05 Court Order

> (I) contumaciously refused to submit to a reasonable and lawful order of a court under Section 34.05 of this Code.

This Section provides for termination if a parent contumaciously refuses to submit to a reasonable and lawful court order pursuant to an investigation of suspected child abuse, as mandated by Section 34.05 of the Family Code. This Subsection has not been the subject of a reported appellate case.

Section 15.02(1)(J), Parental Cause of School or Home Absence

(J) has been the major cause of:

(i) the failure of the child to be enrolled in school as required by the Texas Education Code; or

(ii) the child's absence from his home without the consent of his parents or guardian for a substantial length of time or without the intent to return.

This Subsection has not been the subject of a reported appellate case.

Section 15.02(1)(K), Affidavit of Relinquishment

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by Section 15.03 of this Code.

(See the discussion of Section 15.03 below.)

Section 15.02(2), Termination is in the Best Interest of the Child

Once a culpable act by the parent has been established pursuant to Section 15.02(1), Subsections (A) through (K), the requirement that termination be in the best interests of the child must be considered. In short, a two-part test is contemplated by the Family Code. Merely showing wrongful conduct by the parent is insufficient. Note, however, that the conclusion that termination is in the best interests of a child often flows logically from proof of harmful conduct.

There is a strong presumption that a minor's best interests are served

by allowing custody to remain with the natural parents. It is based on a logical belief that the ties of the natural relationship of parent and child ordinarily furnish strong or genuine efforts on the part of the custodians to provide the child with the best care and opportunities possible and the best atmosphere for the mental, moral, and emotional development of the child. [Wiley v. Spratlan, 543 S.W.2d 349 (Tex. 1976), citing Mumma v. Aguirre, 364 S.W.2d 220 (Tex. 1963)].

In 1976, the Texas Supreme Court, in Holley v. Adams, 544 S.W.2d 367 (Tex. 1976), considered the best interest test and set out nine factors as pertinent to this question. The Court emphasized that this list was not to be considered exhaustive. It included:

(A) the desires of the child;

(B) the emotional and physical needs of the child now and in the future;

(C) the emotional and physical danger to the child now and in the future;

(D) the parental abilities of the individuals seeking custody;

(E) the programs available to assist these individuals to promote the best interests of the child;

(F) the plans for the child by these individuals or by the agency seeking custody;

(G) the stability of the home or proposed placement;

(H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and

(I) any excuse for the acts or omissions of the parent.

In the case of Dressler v. Aldridge, 567 S.W.2d 48 (Tex. Civ. App.-El Paso 1978, no writ), the appellate court assessed the nine considerations in Holley and added another consideration which proved persuasive in its affirmation of the lower court's decision to terminate. The added

factor in that case, an application for adoption by a capable step-parent who sought both the privileges and responsibilities of parent status, swayed the court's evaluation of the child's best interest.

Section 15.021, Filing of Petition to Terminate Before Birth

Section 15.021 allows for the filing of a termination petition before the birth of the child and after the first trimester of the mother's pregnancy. If the petition is filed before the birth of the child, no hearing on termination may be held nor may orders other than temporary orders be issued until the child is at least five days old.

Section 15.03, Affidavit of Relinquishment of Parental Rights

An affidavit of relinquishment of parental rights pursuant to Section 15.03 serves as a procedural device which permits parents to voluntarily give up their children. It must be witnessed by two credible persons, and verified before any person authorized to take oaths. The affidavit must contain nine itemized pieces of information, eight of which are straightforward, while the ninth, revocability of the affidavit, must be read in connection with Section 15.03(d).

An affidavit which designates as managing conservator of the child the Texas Department of Human Resources or an agency authorized by DHR to place children is irrevocable. All other affidavits are revocable unless they expressly provide that they are irrevocable for a stated period of time not to exceed sixty days from the execution date [Sec. 15.03(d), TFC].

In addition, an affidavit of relinquishment may: (1) designate any qualified person, DHR, or any authorized agency as managing conservator of the child; (2) contain a waiver of process in a suit to terminate the parent-child relationship brought under Section 15.02(1)(K), or in a suit to terminate joined with a petition for adoption under Section 16.03(b);[10] and (3) consent to the placement of the child for adoption by DHR or by an agency authorized by DHR to place children for adoption.

In Donati v. Ronquillo, 17 T.L.W.D. 21-6, _____ S.W.2d _____ (Tex. Civ. App.-El Paso 1980), the father executed an affidavit of relinquishment of parental rights, waived the issue and service of citation, and did not appear at trial. The trial court terminated his parental rights and granted adoption by the step-father. No record was made of the proceedings and the natural father filed a writ of error. The appellate court ordered a new trial as the father's affidavit was not equivalent to participation in the trial. According to the court, the father did not waive the making of a record by his affidavit of relinquishment and waiver of service. Without a record of testimony and a statement of facts, his right to appeal was frustrated. Although the waiver of service was effective for the relinquishment proceedings, it did not mention the adoption proceeding. Section 15.03(C)(2) requires such a waiver to note the combined causes of action.

Affidavits of relinquishment, whether to DHR or otherwise, may be revoked where fraud or undue influence can be shown. In a pre-Family Code case, the San Antonio Court of Civil Appeals affirmed a jury finding of "undue influence" in that personnel of an unwed mother's home had subjected the young mother to excessive persuasion to sign a consent to adoption immediately after giving birth. [Methodist Mission Home of

Texas v. N.A.B., 451 S.W.2d 539 (Tex. Civ. App. 1970, no writ)]. And in Rogers v. Searle, 544 S.W.2d 114 (Tex. 1976), the Texas Supreme Court reversed and remanded a termination decision to the trial court to determine an "issue of fact as to fraudulent representations made to petitioner by respondents to induce her to execute the affidavit of relinquishment...."[11]

Section 15.04, Affidavit of Status of Child

When an affidavit of relinquishment contains a statement that the child is not the legitimate child of the father, an affidavit of status of child must be executed by the mother, whether or not a minor, witnessed by two credible persons and verified by a person authorized to take oaths.

Section 15.041, Affidavit of Waiver of Interest in Child

An affidavit of waiver of interest in child may be executed by any person disclaiming any interest in the child and waiving notice or service of citation to any parent-child suit with respect to the child.

Section 15.05, Decree

If the court finds grounds for termination, (i.e., a Section 15.02(1)(A)-(K) act or omission and best interests of the child), it shall enter a decree terminating the parent-child relationship. If the court terminates the parent-child relationship with respect to the only living

parent or to both parents, it shall appoint a suitable, competent adult or authorized agency as managing conservator. An agency designated managing conservator in an unrevoked or unrevocable affidavit of relinquishment shall be appointed managing conservator. The order of appointment may refer to the docket number of the suit and need not refer to the parties nor be accompanied by any other papers on the record. If the court does not order termination, it shall: (1) dismiss the petition, or (2) enter any order considered to be in the best interests of the child.

In Baggett v. State, 541 S.W.2d 226 (Tex. Civ. App.-Tyler 1976, no writ), a juvenile court's oral instruction to delay adoption to give parents time to rehabilitate themselves, which was not placed in the termination order, did not render the order interlocutory. The appellate court was limited to the judgment itself and failure to file timely appeal of the order relegated the parent to extraordinary remedy of bill of review.

The decision in Evans v. Tarrant County Child Welfare Unit, 550 S.W.2d 114 (Tex. Civ. App.-Fort Worth 1977, no writ), supports the judge's wide discretion to enter any order considered to be in the child's best interests. In this case, the judge denied termination but gave managing conservatorship to the welfare unit instead of the parent, and the appellate court affirmed.

Section 15.06, Dismissal of Petition

A termination petition may not be dismissed on a petitioner's motion except by court order entered on written motion assented to by all parties. A dismissal will be without prejudice unless the order specifically makes it with prejudice.

Section 15.07, Effect of Decree

A termination decree divests the parent and child of all legal rights, duties, etc., with respect to others, except that the child retains the right to inherit from and through its divested parents unless the court otherwise provides.

In Banegas v. Holmquist, 535 S.W.2d 410 (Tex. Civ. App.-El Paso 1976, no writ), the court held that the decedent's child, who had been adopted by someone else, was not entitled to the decedent's workman's compensation benefits as a result of Section 15.07. In Go International v. Lewis, 601 S.W.2d 495 (Tex. Civ. App.-El Paso 1980), two natural children of parents killed in a traffic accident were not entitled to recovery in a wrongful death suit because they had been adopted (parental rights terminated) prior to those deaths.

H. Adoption

With the exception of a step-parent adoption, no adoption may be considered unless there has been a decree terminating the parent-child relationship as to each living parent [Sec. 16.03(b) and (c), TFC]. In Schiesser v. State, 544 S.W.2d 373 (Tex. 1976), an adoption of the children took place even though the mother was in the process of appealing the termination decree. Because a final termination decree must exist before an adoption can be granted, the trial court in that case exceeded its statutory authority and the adoption decree was therefore void.

Section 16.03(d) establishes that if an affidavit of relinquishment of parental rights contains a consent that the Department of Human Resources

or an authorized agency may place the child for adoption and appoints the Department or agency managing conservator of the child, no further consent by the parent is required and the adoption decree shall terminate all rights of the parent without further termination proceedings. Nevertheless, the court must first decree a termination of parental rights with a separate finding that termination is in the best interests of the child [Sec. 16.08(b), TFC].

Who May Adopt and Who May Be Adopted

Any adult is eligible to adopt [Sec. 16.02, TFC].[12] Any child residing in Texas at the time a petition requesting adoption is filed may be adopted [Sec. 16.01, TFC].

Adoption Venue

Unlike the rules which govern other suits affecting the parent-child relationship, adoption suits have different venue rules. This is because in the adoption suits there is no contesting party if termination of parental rights has already been ordered. The adoption venue rules allow the adoption agency or managing conservator to have venue at their convenience. When there is a combined termination and adoption hearing, the termination venue holds.

A suit in which adoption is sought may be brought in the county where the child resides, the petitioners reside, or if the child is placed for adoption by an authorized agency, in the county where the authorized agent is located. In most cases, the adoption decree will be

entered by the same court that decreed termination because that is the court with continuing jurisdiction, as specified in Section 11.05 of the Family Code. If not, a transfer must be made under Section 11.06.

Time for Hearing, Social Study, and Residence of the Child

Where an adoption is sought, the court is required to order a social study [as specified in Section 11.12, TFC] and set a date for its filing [Sec. 16.031, TFC]. The hearing on adoption must occur between forty and sixty days from the date the investigator is appointed; for good cause shown, the court may set the hearing at any time that provides adequate time for filing the report of the study.

An adoption hearing may not be before a jury [Sec. 11.13, TFC].

At the hearing it must be shown that the child has lived in the home of the petitioner for at least six months; but if requested in the petition, this requirement may be waived by the court given the court's satisfaction that the best interests of the child will be served [Sec. 16.04, TFC].

Consent Required and Revocation of Consent

If there is an appointed managing conservator other than the petitioner, he or she must give written consent to the adoption and it must be filed in the record [Sec. 16.05(a), TFC]. This requirement may be waived by the court if it finds that the consent is being refused, or has been revoked without good cause [Sec. 16.05(d), TFC]. A parent who is the petitioner's spouse must join in the adoption petition and no further

consent is required [Sec. 16.05(b), TFC]. A child 12 years of age or older must give in-court consent to adoption or consent in writing in a form directed by the court; the court may waive this requirement if the child's best interests would be served [Sec. 16.05(c), TFC]. At any time prior to the granting of an adoption order, a consent required by Section 16.05 may be revoked by filing a signed revocation statement with the court [Sec. 16.06, TFC].

Attendance Required

If husband and wife are joint petitioners and it would be unduly difficult for one of them to appear, the court may waive the attendance of that petitioner if the other spouse is present [Sec. 16.07(a), TFC]. If the child to be adopted is 12 years of age or older, he or she must attend the hearing unless the court finds it to be in the best interests of the child to waive this requirement [Sec. 16.07(b), TFC].

Adoption Decree

The court shall make a decree granting the adoption, reciting the findings pertaining to the court's jurisdiction, if it is satisfied that the adoption requirements have been met and the adoption is in the best interests of the child [Sec. 16.08(a), TFC]. The child's name may be changed in the decree [Sec. 16.08(c), TFC].

Where a joint termination-adoption petition has been filed, the court must, in addition to decreeing adoption, decree termination and make separate findings that termination is in the best interests of the

child and that adoption is in the best interests of the child [Sec. 16.08(b), TFC].

Effect of Adoption Decree

Once the decree is entered, the parent-child relationship exists as if the child were born to the adoptive parents during marriage [Sec. 16.09(a), TFC]. The adoption also ends the court's continuing jurisdiction over the child, and any subsequent suit affecting the parent-child relationship must be commenced as if the child had never before been the subject of a parent-child suit [Sec. 11.05(b), TFC]. The child is entitled to inherit from and through his adoptive parents [Sec. 16.09(b), TFC].

Reasonable access to the child on the part of either the maternal or paternal grandparents of a child whose parent-child relationship has been terminated or who has been adopted may be granted by the court if it is in the best interests of the child. However, the court may only order such access if one of the child's legal parents is a natural parent at the time the request for access is made [Sec. 14.03(d), TFC].[13]

The validity of an adoption decree is not subject to attack, direct or collateral, once two years have passed from the time the decree was entered [Sec. 16.12, TFC].

Subsidized Adoption

Subsidized adoptions are designed to find adoptive homes for hard to place children. Because these children have special needs, many potential

applicants are unwilling to seek adoption without some financial assistance.

The Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272 (discussed above), includes provisions, under a new Title IV-E to the Social Security Act, for federal matching of state adoption assistance payments. Federal matching would be available to states developing such a program (required for participation by October 1, 1982) for a child with "special needs" who was eligible for SSI, AFDC, or foster care maintenance payments under that new Title (refer to the discussion of Title IV-E in Judicial Monitoring of the State Foster Care System above). To find that a child had "special needs," the state agency would have to determine: that the child could not or should not be returned to his home; that there existed a special factor such as ethnic background, age, membership in a minority or sibling group, or the presence of physical, mental, or emotional handicaps, because of which it was reasonable to conclude that the child could not be placed without providing adoption assistance; and, that a reasonable but unsuccessful effort had been made to place the child without providing assistance (except, where to do so would be against the best interests of the child, as where significant emotional ties had been formed with a foster family).

Foster Parent Permanent Care or Adoption

DHR's Social Services Handbook, Section 7434.2. permits permanent foster care as a planned service for the child who must be permanently separated from his biological family but who cannot be adopted. (Note that Chapter 18 mandates court reviews in this situation.) In other

instances, adoption of the child by foster parents is permitted where it is in the best interests of the child.[14]

If DHR rejects an attempt by foster parents to adopt a child, the foster parents have standing to institute a suit to terminate parental rights (of the natural parents) and petition for adoption under Section 11.03 of the Family Code, which allows anyone with "an interest in the child" to bring a suit affecting the parent-child relationship [Harris Co. Child Welfare Unit v. Caloudas, 590 S.W.2d 596 (Tex. Civ. App.-Houston [1st Dist.] 1979)].

I. Appeals

Section 11.19 of the Family Code specifies that appeals from orders, decrees, or judgments entered in suits affecting the parent-child relationship shall be as in civil cases generally.[15] Any party to such a suit may take an appeal from an order, decree, or judgment entered under:

(1) Chapter 13 of the Family Code;

(2) Chapter 14, including an appointment or refusal to appoint a managing conservator or possessory conservator; or modifying any such order previously entered;

(3) Chapter 15, including termination or refusal to terminate the parent-child relationship; or appointing a managing conservator; or

(4) Chapter 16, granting or refusing an adoption.

The usual rule is that an appeal with or without a supersedeas bond will not suspend the order unless the court entering the order also does. On a proper showing, the appellate court may suspend the order.

Note that temporary custody orders made pursuant to Section 11.11 of the Family Code and pending final determination by the court are purely

interlocutory and are not appealable [Carpenter v. Carpenter, 534 S.W.2d 447 (Tex. Civ. App.-Beaumont 1976, no writ; In the Interest of T.R., 596 S.W.2d 953 (Tex. Civ. App.-Fort Worth 1980)].

NOTES TO CHAPTER III

1. See: Texas Department of Human Resources. Social Services Handbook, Sec. 7221.1.

2. Texas Department of Human Resources. Social Services Handbook, Sec. 7222.1.

3. For a discussion of the revised Chapter 17, see: "Recent Amendments to the Texas Child Abuse Statutes: An Analysis and Recommendation," 11 St. Mary's Law Journal 914 (1980).

4. See: Goldstein, J., Freud, A., and Solnit, A. Beyond the Best Interest of the Child, (New York: The Free Press, 1973).

5. See: Davidson, H.A. Representing Children and Parents in Abuse and Neglect Cases, (Washington, D.C.: National Legal Resource Center for Child Advocacy and Protection, 1980); also note the materials listed in the "Guardian Ad Litem" section of the Bibliography following the text.

6. Wald, M. "State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights," 28 Stanford Law Review 623 (1976).

7. Permanent Planning for Children in Foster Care: A Handbook for Social Workers, (Washington, D.C.: U.S. Government Printing Office, DHHS Publication No. (OHDS) 80-30124, Reprinted May 1980).

For a detailed look at the problem and the issues, see:

Mnookin. "Foster Care In Whose Best Interests," 43 Harvard Ed. Review 599 (1973); National Commission of Children in Need of Parents. Who Knows? Who Cares? Forgotten Children in Foster Care, (New York: Child Welfare League of America, 1979).

8. Texas allows voluntary legitimation (Section 13.21, TFC) if it is in the best interest of the child. This raises the issue as to whether illegitimate fathers have any rights and, if so, how they can be terminated. In a recent Texas Supreme Court case, In the Interest of C.D.U., 589 S.W.2d 543 (Tex. 1980), bringing a termination suit against the father of an illegitimate child was specifically held to be inappropriate. Also see, In the Interest of T.E.T., 603 S.W.2d 793 (Tex. 1980), in which the Texas Supreme Court ruled that equal protection was not denied the natural father of an illegitimate child when the unmarried mother's relinquishment resulted in termination of her parental rights. In the termination suit the father had filed a cross-action seeking legitimation and custody of the child; his petition was denied and the adoption agency was named managing conservator. The Texas Supreme Court distinguished Caban v. Mohammed, 441 U.S. 380 (1979), on the grounds that the father in

that case had established a relationship with the children who were no longer infants, while in T.E.T., the father had no established relationship with the infant child.

9. See also: Brokenleg v. Butts, 559 S.W.2d 853 (Tex. Civ. App.-El Paso, writ ref'd n.r.e.); Craddock v. Worley, 601 S.W.2d 445 (Tex. Civ. App.-Dallas 1980); and In the Interest of T.B.S., 601 S.W.2d 539 (Tex. Civ. App.-Tyler 1980).

10. Section 15.02 provides for the execution of an affidavit of relinquishment before or after the suit is filed, and that the affidavit may include a waiver of process. The court in In re B.B.F., ____ S.W.2d ____. 17 T.L.W.D. 8-4 (Tex. Civ. App.-San Antonio 1980), specified that: "The Family Code provides an exception to the general rule... After executing an unrevoked or irrevocable affidavit of relinquishment of parental rights, a natural parent is no longer an interested party in a suit to terminate the parent-child relationship. Consequently, neither due process nor logic requires that a person who has voluntarily relinquished parental rights and waived service of citation be given notice of a subsequent suit to terminate the parent-child relationship."

11. For two cases finding no duress or undue influence, see:

Pattison v. Spratlan, 535 S.W.2d 48 (Tex. Civ. App.-Tyler 1976), aff'd as modified 539 S.W.2d 60 (Tex. 1976), cert. denied 97 S.Ct. 531; and Myers v. Patton, 543 S.W.2d 22 (Tex. Civ. App. 1976, no writ).

12. See: In Re An Unnamed Child, 581 S.W.2d 711 (Tex. Civ. App.-Fort Worth 1979).

13. For a discussion of Section 14.03, see:

"A Symposium on the Texas Family Code," (whole issue), 5 Texas Tech University Law Review 2 (1974); and 5 St. Mary's Law Journal 474 (1973), concerning statutory rights for grandparents; also note dicta in Remling v. Green, 601 S.W.2d 84 (Tex. Civ. App.-Houston [1st Dist.] 1980), involving grandparents contesting an adoption by the maternal aunt and uncle. The children in that case lived with the aunt and uncle following the accidental death of both parents. The adoption decree (reversed and remanded on other grounds) did not award visitation or access to the grandparents.

14. See: Texas Department of Human Resources. Social Services Handbook, Sec. 7433.5.

15. See: Texas Rules of Civil Procedure, 352-432.

CHAPTER IV.

TRIAL ISSUES

This manual cannot go into all the trial and evidentiary matters associated with child abuse and neglect cases. Only those matters which are unique to these cases or which frequently arise will be discussed.

A. Non-Evidentiary

1. Hearing

Section 11.14 of the Family Code states that proceedings in suits affecting the parent-child relationship shall be as in civil cases generally, except as provided otherwise in that Section. This rule, however, is tempered by case law which states that "the technical rules of civil procedure cannot apply with equal force in a child custody case as in other civil cases, because the sole determining factor in a child custody case must be the best interests of the child" [Erwin v. Erwin, 505 S.W.2d 370, 372 (Tex. Civ. App.-Houston [14th Dist.] 1974, no writ); Burson v. Montgomery, 386 S.W.2d 817 (Tex. Civ. App.-Houston 1965, no writ)]. Termination cases can be distinguished by the fact that a dual standard exists, a best interests test plus standards for parental conduct. It could be argued that since the integrity of the family unit is being severely challenged in termination cases, the liberalization of rules of evidence for civil suits should not apply. Indeed, the Texas Supreme Court ruled that a higher burden of proof applies in termination cases [In the Interest of G.M., et al., 596 S.W.2d 846 (Tex. 1980); see discussion of Standard of Proof below].

2. Presumption on Behalf of Natural Parents

Section 14.01(b) of the Family Code gives parents a paramount right to be appointed managing conservator unless the appointment would not be in the best interests of the child. This is a codification of a presumption under prior law that children are best served when custody remains with the natural parents [Herrera v. Herrera, 409 S.W.2d 395 (Tex. 1966)].

3. Jury Trial

In a suit affecting the parent-child relationship, except a suit in which an adoption is sought, any party may demand a jury trial [Sec. 11.13(a), TFC]. A jury trial is not automatic; a request must be made and a fee paid at a reasonable time prior to the date set for the non-jury trial (not less than ten days in advance) [Texas Rules of Civil Procedure 216]. An oath of inability to pay the jury fee may cause the fee to be waived [Texas Rules of Civil Procedure 217].

4. Right to Counsel

Attorney Ad Litem[1]

In any suit brought by a governmental entity seeking termination of the parent-child relationship or to be named conservator of a child, the court shall appoint an attorney ad litem to represent the child as soon as practical to ensure adequate representation of the child's interests [Sec. 11.10(d), TFC]. The attorney is entitled to a reasonable fee set

by the court to be paid by the parents if they are able to do so; if they are indigent, the statute is silent as to the source of such payments [Sec. 11.10(e), TFC]. An attorney ad litem may make preemptory strikes, question the witnesses, and argue before the jury [Priest v. Priest, 536 S.W.2d 954, 955 (Tex. Civ. App.-Waco 1976, no writ)].

The Parent

Section 11.10(c) of the Family Code allows the court, at its discretion, "to appoint an attorney for any party in a case in which it deems representation necessary to protect the interests of the child who is the subject of the suit." However, in Davis v. Page, 618 F.2d 374 (1980), the Fifth Circuit Court of Appeals held that the due process clause of the Fourteenth Amendment requires that parents in a child dependency hearing (in Florida) be advised of their right to assistance of counsel immediately following service of the petition for an adjudication of dependency or seizure of the child, and if indigent, that counsel be appointed unless they knowingly and intelligently waive their right to counsel. The order in Davis v. Page has been vacated pending a rehearing en banc.

The State (Government Entity)

When the Department of Human Resources is a party to a suit, the Department shall be represented in the trial court by the prosecuting attorney who represents the state in criminal cases, in the district or county court of the county where the suit is filed or transferred, or by the attorney general [Sec. 11.20, TFC].

B. Evidentiary

1. Testimonial Privilege [2]

According to the child abuse reporting provisions of the Family Code, evidence may not be excluded in any child abuse and neglect proceeding on the grounds of privileged communication except in the case of communications between attorney and client [Sec. 34.04, TFC].

However, subsequent to the enactment of that provision, the Texas Legislature established a new Article 5561(h) to Vernon's Texas Civil Statutes (H.B. 1163, effective August 27, 1979) concerning privileged communications between mental health professionals and their clients. Unless the examining professional has acquired written informed consent, or the examination was conducted pursuant to a court order and the person examined was informed that communications would not be privileged, the professional must object to being asked to testify, or face a possible suit for violation of the client's confidentiality [Salas v. State of Texas, (Tex. Civ. App.-Austin, 1979), trial court error on admitting testimony of psychiatrist over his objection in a civil commitment hearing]. It is unclear at present whether Section 34.04 of the Family Code abrogating privileged communications supersedes the provisions of Article 5561(h) or vice versa.

2. Standard of Proof

Until just recently, the standard of proof in a suit affecting the parent-child relationship was based on a preponderance of the evidence

under rules generally applicable to civil cases. The Supreme Court of Texas in In the Interest of G.M., et al., 596 S.W.2d 846 (Tex. 1980), declared that termination of parental rights must be based on the higher standard of "clear and convincing evidence." In a subsequent case, In the Interest of Hare, 599 S.W.2d 856 (Tex. Civ. App.-Texarkana 1980) applied the higher standard retroactively to a case decided prior to In the Interest of G.M., et al..

3. Social Study

In a suit affecting the parent-child relationship, the court may order that a social study be made of the circumstances and conditions of the child and of the home of a person seeking managing conservatorship or possession of the child [Sec. 11.12(a), TFC]. The social study may be made by any person, or public or private agency appointed by the court [Sec. 11.12(b), TFC]. If an authorized agency is managing conservator, then that agency shall make the study. The court shall set criteria for the social study.

The findings and conclusions of the person or agency making the study shall be filed with the court on a specified date [Sec. 11.12(c), TFC]. The report shall be made part of the court record. In D.F. v. State, 525 S.W.2d 933 (Tex. Civ. App.-Houston [1st Dist.], writ ref'd n.r.e.), the appellate court held that the social study should not be before the trial court if it is not admitted into evidence.[3] The contents of the study may be disclosed to the jury only subject to the proper rules of evidence [Sec. 11.12(c), TFC]. This means that the author of the study must be available in court to identify it and be

cross-examined [Magallon v. State, 523 S.W.2d 477 (Tex. Civ. App.-Houston [1st Dist.] 1975, no writ)]. If the author is not present, however, the burden is on the person complaining of the study's admission to object to the author's unavailability. If the complaining party fails to object, he or she may not complain on appeal of the admission of the study [In the Interest of Berrera, 531 S.W.2d 908 (Tex. Civ. App.-Amarillo 1975, no writ)].

In a bench trial, the appellate court will assume that the trial judge disregarded any inadmissible evidence in the study [Fletcher v. Travis County Child Welfare Unit, 539 S.W.2d 184 (Tex. Civ. App.-Austin 1976, no writ)]. However, a decision was reversed where a court ordered a supplemental social study after the close of the hearing and based its judgment on that study. The appellate court held that the appellant should have had the opportunity to cross-examine the author of the study [Kates v. Smith, 556 S.W.2d 630 (Tex. Civ. App.-Texarkana 1977, no writ)].

A representative of the agency making the study may be compelled to attend the hearing and testify [Sec. 11.14(c), TFC]. This may not be just any agency representative; the person who authored the study must be available for cross-examination if the study is to be properly admitted [Sec. 11.14(f), TFC].

4. Expert Testimony [4]

Because much of child abuse litigation revolves around the extent of children's injuries and/or parents' abilities, the use of experts is common in child abuse cases. In Hall v. Harris County Welfare Unit, 533 S.W.2d 121 (Tex. Civ. App.-Houston [14th Dist.] 1976, no writ), the only

evidence relating to the children's and mother's medical condition was offered by social workers; no expert testimony or medical records were introduced. In remanding that case, the appellate court stated, "Whenever a cause relies heavily, as does this one, on the proof of medical facts, then the party on whom rests the burden of proof must come forward with medical testimony or medical records, or some evidence other than hearsay or the unsubstantiated opinion of witnesses not qualified as medical experts" (at p. 123).

Depending upon their training and experience, caseworkers may be qualified to testify as expert witnesses in child abuse cases. However, in Bell v. Bell, 593 S.W.2d 424 (Tex. 1979), the court rejected the idea that a caseworker is automatically considered an expert witness and that this decision remains within the court's discretion.

5. Hospital Records and X-Rays

In cases in which a child has suffered physical abuse, the state may introduce medical records and x-rays taken of the child's injuries. In order to introduce them into evidence as business records, the party offering them (usually the state) must file an affidavit by the hospital records custodian with the court fourteen days before trial in accordance with the requirements of Article 3737(e), V.T.C.A., unless the custodian of the records is to appear in court. The case law is divided as to whether the x-rays themselves or the testimony of the radiologist is the best evidence.[5]

6. Photographs

Photographs of injuries which a child sustains are often useful demonstrative evidence at a trial. Because hearings, particularly terminations hearings, often occur much beyond the time of injury, a photograph showing the injuries can be important evidence, as it provides the Judge or jury with a visible and vivid representation of the facts. Texas courts have given wide latitude to the admission of photographic evidence as long as some witness can verify that the photograph is at least a substantially correct representation of what it purports to depict.[6]

7. Circumstantial Evidence

> The doctrine of res ipsa loquitur means that a rebuttable presumption that the defendant was negligent arises upon proof that the instrumentability that caused the injury was in the defendant's exclusive control, and that the accident was one which ordinarily does not occur in the absence of someone's negligence.[7]

While the court in Higgins v. Dallas County Child Welfare Unit, 544 S.W.2d 745 (Tex. Civ. App.-Dallas 1976, no writ), did not adopt the res ipsa loquitur doctrine with all its tort law implications, it agreed that child abuse and neglect cases, pursuant to Section 15.02 of the Family Code, could be sufficiently established by circumstantial evidence. The court's justification for allowing circumstantial evidence is that this type of evidence is often the only proof available since abusive actions usually occur within the privacy of the home, the child is either intimidated or too young to testify, and the parents tend to protect each other.

The Higgins court stated that "... a fact finding that parents either abused a child or knowingly allowed it to remain in dangerous conditions may be supported by evidence of (1) multiple injuries or other serious impairment of health that ordinarily would not occur in the absence of abuse or gross neglect, and (2) the parents' control over the child during the period when the abuse or neglect is alleged to have occurred" (at p. 750). Lack of any reasonable explanation by the parents of the child's condition is an additional circumstance that may be considered in support of such a finding. This list was not to be considered exhaustive and other facts and circumstances might raise the issue of child abuse and neglect.

NOTES TO CHAPTER IV

1. See the discussion, "Some Practical Considerations for the Adversaries," in Chapter III, Part D(3) of this text. The first real discussion of the role of an attorney ad litem for the child in Texas appeared in Pleasant Hills Children's Home v. Needa, 596 S.W.2d 947 (Tex. 1980). Also see: Carol Lane, "The Role of the Ad Litem in Divorce-Related Child Custody Cases," in the August 1980 State Bar of Texas Advanced Family Law Coursebook; and see, generally, the "Guardian Ad Litem" section of the Bibliography following the text.

2. See the "Health Professionals Testimony" section of the 1980 State Bar of Texas Marriage Dissolution Course for a discussion of these issues.

3. The requirements for admitting a social study into evidence appear to vary depending upon the type of suit involved. The filing of a social study report [Sec. 11.12] is required in all adoption proceedings [Sec. 16.031(a) of the Family Code]. Given Section 11.14 of the Code which provides that the rules of evidence apply in a SAPCR as in other civil suits, the Legislature apparently contemplated that the report would be offered into evidence and that the maker would be subject to direct and cross-examination. This was the conclusion of the appellate court in Remling v. Green, 601 S.W.2d 84 (Tex. Civ. App.-Houston [1st Dist.] 1980). The appellate court ruled that consideration by the trial court of the social study without its admission into evidence, and without the testimony of its maker, denied the parties contesting the adoption (grandparents) the valuable right of cross-examination and the opportunity to contradict or overcome the statements included. The adoption decree was therefore reversed and remanded to the trial court. However, the Texas Supreme Court reversed the lower court's ruling [Green v. Remling, 24 Tex.S.Ct.Jl. 81, _____ S.W.2d _____ (Tex. 1980)] stating that it was not a reversable error for the trial court to consider the social study which had been ordered and filed pursuant to Sec. 16.031(a). In the adoption proceeding, the parents' rights have already been terminated. Thus, the original contesting party, the parents, with a fundamental right to the custody of their child, is no longer involved. The parties to the adoption suit do not possess a right to the custody of the child requiring the due process protections of the evidentiary requirements.

4. See: "The Psychiatric Expert Witness in the Case of an Emotionally Maltreated Child" and "Social Worker as Witness," videotapes and accompanying manuals prepared by the Region VI Resource Center on Child Abuse and Neglect, The University of Texas at Austin, School of Social Work, Austin, Texas 78712.

5. See: Robertson, J.L. "Photographic Evidence: Standard for Admissibility in Texas," 42 Texas Bar Journal 3 (March 1979).

6. Ibid.

7. Prosser, The Law of Torts, Sec. 39-40 (4th ed. 1971); Restatement (Second) of Torts, Sec. 328D (1965).

CHAPTER V.

MISCELLANEOUS

A. Indian Child Welfare Act

In 1967, the Devil's Lake Sioux Tribe in South Dakota discovered that as many as one-fourth (1/4) of their children were being removed from their parents and placed in non-Indian families. This revelation resulted in many years of study and political effort culminating in the enactment by Congress of the "Indian Child Welfare Act of 1978" (P.L. 95-608, 92 Stat. 3069, 25 U.S.C. Sec. 1918) on November 8, 1978. The Act is intended to protect the best interests of Indian children and preserve the integrity of Indian tribes by preventing the unwarranted and arbitrary removal of Indian children from their families and tribes. (See Appendix B for a copy of the Act and a summary of its major provisions.)

The new law recognizes that tribes have an important role to play in decisions involving the placement of Indian children. Under the Act, jurisdiction over children residing or domiciled on an Indian reservation belongs to the tribal court. In cases involving children not residing or domiciled on an Indian reservation, the Act provides for the transfer of jurisdiction from the state court to the appropriate tribal court under certain conditions. Because some tribes are located in states that have previously asserted jurisdiction over legal proceedings on Indian reservations, the Interior Department has imposed regulations that will enable these tribes to reassume jurisdiction over child custody matters [Federal Register, Vol. 44, p. 45092, July 31, 1979].

In those cases in which the state court retains jurisdiction, the

Act imposes standards of evidence for proceedings involving placement and termination of parental rights, establishes placement preferences for Indian children, and encourages placement with the extended Indian family. In order to facilitate uniform implementation of the Act, the Interior Department has issued "Guidelines for State Courts - Indian Child Custody Proceedings" [Federal Register, Vol. 44, p. 67584, November 26, 1979]. These "Guidelines" are not binding on state courts but are intended to provide the views of the Interior Department regarding the operation of the Act.

B. Texas Family Code, Title 4, Protection of the Family

The 66th Legislature added a new Title 4, Protection of the Family, to the Family Code (see Appendix C). It attempts to create a legislative remedy to the problem of family violence. According to the provisions of the new Title, violence between family members or members of the same household may be enjoined by a protective order of a district or county court.

BIBLIOGRAPHY

Child Abuse and Neglect: Legal Aspects

Adler, Lorraine. "Child Abuse Victims: Are They Also Victims of an Adversarial and Hierarchical Court System." 5 Pepperdine Law Review 717-739 (1978).

Areen Judith. "Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases." 63 Georgetown Law Review 887 (1975).

Baker, J. P. "Big Brother." 53 Florida Bar Journal 672 (1979).

Besharov, Douglas J. "The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect." 23 Villanova Law Review 458 (1978).

Brown, Rowine H. "Child Abuse: Attempts to Solve the Problem by Reporting Laws." 60 Women Lawyers Journal 73 (1976).

Bird, Ron. "The Texas Family Code Under Fire." 43 Texas Bar Journal 313 (1980).

Bourne, Richard. "The Role of Attorneys on Child Abuse Teams." 54 Chicago-Kent Law Review 773 (1978).

Bourne, Richard, and Newberger, Eli H. "Family Autonomy or Coercive Intervention? Ambiguity and Conflict in the Proposed Standards for Child Abuse and Neglect." 57 Boston University Law Review 670 (1977).

Bowers, William. "Does Due Process Require Clear and Convincing Proof Before Life's Liberties May be Lost?" 24 Emory Law Journal 105 (1975).

Caulfield, Barbara. The Legal Aspects of Protective Services for Abused and Neglected Children. Washington, D.C.: U.S. Government Printing Office, Superintendent of Documents, DHEW Pub. No. 017-091-00218-5, (1978).

"Child Maltreatment: An Overview of Current Approaches." 18 Journal of Family Law 115 (1979).

Clements, Theodore J. "Child Abuse: The Problem of Definition." 8 Creighton Law Review 729 (1975).

"Constitutional Limitations on the Scope of State Child Neglect Statutes." 79 Columbia Law Review 719 (1979).

Dickens, Bernard M. "Legal Responses to Child Abuse." 12 Family Law Quarterly 1 (1978).

Donovan, Thomas J. "Legal Response to Child Abuse." 2 William and Mary Law Review 960 (1970).

Downs, William. "The Meaning and Handling of Child Neglect: A Legal View." Child Welfare (March 1963).

Education Commission of the States. Trends in Child Protection Laws. Available annually: Education Commission of the States, Suite 300, 1860 Lincoln Street, Denver, Colorado 80295. Price: $2.50.

Flannery, Ellen J. "Synopsis: Standards Relating to Abuse and Neglect." 57 Boston University Law Review 663 (1977).

Fontana, Vincent J. Preface to "Medical, Legislative, and Legal Aspects of Child Abuse and Neglect: A Symposium." 23 Villanova Law Review 445 (1978).

Fontana, Vincent J. "To Prevent Abuse of the Future." 10 Trial 14 (1975).

Fraser, B. "A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes." 54 Chicago-Kent Law Review 641 (1978).

Ganley, Paul M. "Battered Child: Logic in Search of Law." 8 San Diego Law Review 364 (1971).

Giovannoni, Jeanne, and Becerra, Rosuna. Defining Child Abuse. New York: Free Press, 1979.

Grumet, Barbara R. "Plaintive Plaintiffs: Victims of Battered Child Syndrome." 4 Family Law Quarterly 290 (1970).

Hays, Richard H. "Child Abuse: An Overview." 8 Creighton Law Review 743 (1975).

Hochhauser, Lois. "Child Abuse and the Law: A Mandate for Change." 18 Howard Law Journal 200 (1973).

Hubenak, Priscilla. "Due Process for Parents in Emergency Protection Proceedings Under the Texas Family Code: Suggestions for Improving the System." 15 Houston Law Review 709 (1978).

Institute of Judicial Administration, American Bar Association. Juvenile Justice Standards Project: Standards Relating to Abuse and Neglect. Cambridge, Mass.: Ballinger Publishing Co., 1977.

Justice, Blair; Friedrich, B.; and Clark, L. "(Texas) Judges' Views of Child Abuse: A Survey of Attitudes and Experience." 41 Psychological Reports 887 (1977).

Katz, Sanford. When Parents Fail: The Law's Response to Family Breakdown. Boston: Beacon Press, 1971.

Katz, Sanford N.; Ambrosino, Lillian; McGrath, Melba; and Sawitsky, Kitt. "Legal Research on Child Abuse and Neglect: Past and Future." 2 Family Law Quarterly 151 (1977).

Krause, Harry D. Family Law: Cases and Materials. St. Paul: West Publishing Co., 1976.

Krause, Harry D. 1978 Supplement to Cases and Materials on Family Law. St. Paul: West Publishing Co., 1978.

Levine, Richard. "Caveat Parens: A Demystification of the Child Protection System." 35 University of Pittsburgh Law Review 1 (1973).

Lewis, Ken. Glossary on Custody and Related Legal Terms. Greenville, N.C.: Single-Fathers Research Project, 1978.
Availability: Director, Single-Fathers Research Project, 2901 Jefferson Drive, Greenville, N.C. 27834. Price: $3.00 plus $1.00 postage; 35 pp.

McCathren, Randall R. "Accountability in the Child Protection System: A Defense of the Proposed Standards Relating to Abuse and Neglect." 57 Boston University Law Review 707 (1977).

McDonald, Richard Allen. "Torts: Civil Action Against Physician for Failure to Report Cases of Suspected Child Abuse." 30 Oklahoma Law Review 482 (1977).

McClean, J.D. "The Battered Baby and the Limits of the Law." 5 Monash Law Review 1 (1978).

McGrath, Malba. "Early Sorrow: Some Children of Our Times." 8 Family Law Quarterly 91 (1974).

Miller, Laura. "Principles of Res Ipsa Loquitur Apply to Proof of Child Abuse and Neglect." 9 Texas Tech Law Review 335 (1978).

Mnookin, Robert H. Child, Family and State. Boston: Little, Brown & Co., 1978.

Mondale, Walter F. "Introductory Comments: Child Abuse Symposium." 54 Chicago-Kent Law Review 635 (1978).

Piersona, P.; Ganousis, Jr.; Volenik, A.; Swanger, H.; and Connell, P. Law and Tactics in Juvenile Cases, A project of the National Juvenile Law Center, The American Law Institute, American Bar Association Committee on Continuing Education, 4025 Chestnut St., Philadelphia, Pennsylvania 19104, (1977).

Raffalli, Henri C. "The Battered Child: An Overview of a Medical, Legal, and Social Problem." 16 Crime and Delinquency 139 (1970).

Rose, Carl M. Some Emerging Issues in Legal Liability of Children's Agencies. New York: Child Welfare League of America, Inc., 1978.
Availability: Publications Dept. of Child Welfare League of America, 67 Irving Place, New York, New York 10003. Price: $6.00, 68 pp.

Schrier, Carol J. "Child Abuse: An Illness or a Crime?" 58 Child Welfare 237 (1979).

Selmer, Dennis J. "A Child's Emotional Health: The Need for Legal Protection." 15 Tulsa Law Journal 299 (1980).

Solender, Ellen. "Family Law: Parent and Child (Annual Survey of Texas Law)." 34 Southwest Law Journal 159 (1980).

Torigian, John. "Sims v. The State Department of Public Welfare: Constitutional Limitations of Child Abuse Legislation." 19 South Texas Law Journal 491 (1979).

U.S. Department of Health, Education, and Welfare, Office of Human Development Services. Child Abuse and Neglect: State Reporting Laws. Washington, D.C.: U.S. Government Printing Office, DHEW Publication No. (OHDS) 80-30265, Revised December 1979.

Wald, Michael. "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards." 27 Stanford Law Review 985 (1975).

White, Michael Freeman. "Dependency Proceedings: What Standard of Proof? An Argument Against the Standard of 'Clear and Convincing'." 14 San Diego Law Review 115 (1977).

Foster Care

"Children and the Law: A Symposium on Child Placement-Law and Theory." 20 Catholic Lawyer 85 (1974).

Children's Defense Fund. Children Without Homes: An Examination of the Public Responsibility to Children in Out-of-Home Care. Washington, D.C.: Children's Defense Fund, 1979.
Availability: Children's Defense Fund, 1520 New Hampshire Ave., N.W., Washington, D.C. 20036.

"Foster Placement Review: Problems and Opportunities." 83 Dickinson Law Review 487 (1979).

Katz, Sanford. "Legal Aspects of Foster Care." 5 Family Law Quarterly 283 (1971).

Mnookin, Robert H. "Foster Care: In Whose Best Interest?" 43 Harvard Educational Review 599 (1973).

National Association of Attorney Generals. "Legal Issues in Foster Care." Available from: Committee on the Office of Attorney General, 3901 Barrett Drive, Raleigh, N.C. 27609.

National Commission on Children in Need of Parents. Who Knows? Who Cares? Forgotten Children in Foster Care. New York: Child Welfare League of America, Inc., 1979.
Available from: Child Welfare League of America, Inc., 67 Irving Place, New York, New York 10003.

Pike, U.; Downs, S.; Emlen, A.; Downs, G.; and Case, D. Permanent Planning for Children in Foster Care: A Handbook for Social Workers, Regional Research Institute for Human Services, Portland State University, Portland, Oregon; OR, DHEW Publication No. (OHDS) 77-30124 (1977).

Wald, Michael S. "State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights." 28 Stanford Law Review 623 (1976).

Whitten, Patricia. "The Rights of Foster Parents to the Children in Their Care." 50 Chicago-Kent Law Review 86 (1973).

Wiltse, Kermit, and Gambrill, E. "Foster Care, 1973: A Reappraisal." 32 Public Welfare 7 (1974).

Adoption

Benet, Mary K. The Politics of Adoption. New York: Free Press, 1976.

Sorosky, A.; Baran, A.; and Panner, R. The Adoption Triangle. Garden City, New York: Anchor Press, Doubleday, 1978.

Welfare Research, Inc. Freeing Children for Adoption: A State-of-the-Art Report. Albany: Welfare Research, Inc., 1978.
Availability: Ms. Stephanie Richardson, Welfare Research, Inc., 112 State Street, Albany, New York 12207. Price: $6.00

Child Abuse and Neglect: Medical Aspects

Brown, Rowine Hayes; Fox, E.; and Hubbard, E. "Medical and Legal Aspects of Battered Child Syndrome." 50 Chicago-Kent Law Review 45 (1973).

Helfer, Ray, and Kempe, H., eds. The Battered Child 3d ed. Chicago: University of Chicago, 1980.

Child Welfare Services

Costin, Lela B. Child Welfare Policies and Practice. New York: McGraw-Hill, 1972.

Helfer, Ray, and Kempe, H., eds. Child Abuse and Neglect: The Family and the Community. Cambridge, Mass.: Ballinger Publishing Co., 1976.

Justice, Blair, and Justice, R. The Abusing Family. New York: Human Sciences, 1976.

Kadushin, Alfred. Child Welfare Services. 2d ed. New York: Macmillan Co., 1974.

Recent Developments: Duty of the state to provide supportive services to a parent before terminating the parent's rights, In re M.A. 529 P.2d 333 (Colo. Ct. App. 1974). 14 Journal of Family Law 341 (1975).

Social Work and the Law

Barton, Preston, II, and Byrne, B. "Social Work Services in a Legal Aid Setting." 56 Social Casework 226 (1975).

Bell, Cynthia. "Legal Consultation for Child Welfare Workers." 33 Public Welfare 33 (1975).

Bell, Cynthia. "Legal Consultation for Child Welfare Workers." 33 Public Welfare 134 (1975).

Bell, Cynthia, and Mlyniec, W. "Preparing for a Neglect Proceeding: A Guide for the Social Worker." 32 Public Welfare 26 (1974).

Bernstein, Barton. "Lawyer and Social Worker as an Interdisciplinary Team." Social Casework, September 1980, p. 416.

Bernstein, Barton. "Malpractice: An Ogre on the Horizon." 23 Social Work 106 (1978).

Bernstein, Barton. "The Social Worker as an Expert Witness." Social Casework, July 1977, p. 412.

Bernstein, Barton. "The Social Worker as a Courtroom Witness." Social Casework, November 1975, p. 521.

Brieland, Donald, and Lemmon, J. Social Work and the Law. St. Paul: West Publishing Co., 1977.

Ferruggia, Robin. "Attorneys and Social Workers: A New Alliance." 35 NLADA Briefcase 134 (1978).

Fogelson, Franklin. "How Social Workers Perceive Lawyers." 51 Social Casework 95 (1970).

Harris, Janice, and Bernstein, Barton. "Lawyer and Social Worker as a Team: Preparing for Trial in Neglect Cases." 59 Child Welfare 469 (1980).

Katz, Sanford. "The Lawyer and the Caseworker: Some Observations." 42 Social Casework 10 (1961).

Lawry, Marcia. "The Judge v. The Social Worker: Can Arbitrary Decision-making be Tempered by the Courts?" 52 New York University Law Review 1033 (1977).

National Conference of Lawyers and Social Workers. Law and Social Work. Washington, D.C.: National Association of Social Workers, 1973.

Pẽna, Enrique. A Coursebook on the Legal Process for Social Workers: Protecting Texas Children. El Paso: Crichet Printing Co., 1980. Available from: Crichet Printing Co., 921 Myrtle, El Paso, Texas 79901. Price: $12.50.

Scherrer, James. "How Social Workers Help Lawyers." 21 Social Work 279 (1976).

Failure-to-Thrive Syndrome

Bullard, Dexter M., Jr.; Glaser, H.; Heagarty, M.; and Pivchik, E. "Failure to Thrive in the 'Neglected' Child." 37 American Journal of Orthopsychiatry 680 (1967).

Glaser, H.; Heagarty, M.; Bullard, D., Jr.; and Pivchik, E. "Physical and Psychological Development of Children with Early Failure to Thrive." 73 Journal of Pediatrics 690 (1968).

Harris, J., and Bernstein, B. "Lawyer and Social Worker as an Interdisciplinary Team: Evidence of 'Failure to Thrive' in Custody and Termination Cases." Law and Social Work Quarterly, in press.

Powell, Gerald F., M.D., Department of Pediatrics, Room C3-30, Child Health Center, University of Texas Medical Branch, Galveston, Texas 77550. "Child Abuse: Non-Organic Failure to Thrive." (videotape). National College of District Attorneys, (undated).

Rosett, Henry L., et al. "Fetal Alcohol Syndrome." 273 Annals of the New York Academy of Sciences 118 (1976).

Whiting, Leila. "Defining Emotional Neglect." 5 Children Today 2 (1976).

Guardian Ad Litem

Bernstein, Barton E. "The Attorney Ad Litem: Guardian of the Rights of Children and Incompetents." Social Casework, October 1979, p. 463.

Betinelski, Carmen Ray. "Court Appointed Special Advocate: The Guardian Ad Litem for Abused and Neglected Child." Juvenile and Family Court Journal, August 1978, p. 65.

Fraser, Brian. "Independent Representation for the Abused and Neglected Child." 13 California Western Law Review 16 (1977).

Freedheim, G., and Kurtz, W. "Guardian Ad Litem for Children Project, Cleveland." 16 Trial 56 (1980).

National Association of Counsel for Children. Advocacy for the Legal Interests of Children: A Trial Notebook. Edited by Donald Bross. Denver: National Association of Counsel for Children, 1980. Availability: National Association of Counsel for Children, 1205 Oneida Street, Denver, Colorado 80302.

National Association of Counsel for Children. Legal Representation of the Maltreated Child: A Trial Notebook. Edited by Donald Bross. Denver: National Association of Counsel for Children, 1979. Availability: National Association of Counsel for Children, 1205 Oneida Street, Denver, Colorado 80220.

Pedicord, Diane. "Courts Seen and Not Heard: The Child's Need for His Own Lawyer in Child Abuse and Neglect Cases." 29 Oklahoma Law Review 439 (1976).

Redeker, J. "The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases." 23 Villanova Law Review 521 (1978).

Solender, Ellen. "The Guardian Ad Litem: A Valuable Representative or an Illusory Safeguard?" 7 Texas Tech Law Review 619 (1976).

U.S. Department of Health and Human Services, Office of Human Development. Representation for the Abused and Neglected Child: The Guardian Ad Litem and Legal Counsel. Washington, D.C.: U.S. Government Printing Office, DHHS Publication No. (OHDS) 80-30272, 1980.

Indian Child Welfare Act (P.L. 95-608, 92 Stat. 3069, 25 U.S.C., Sec. 1918)

Barsh, Russel. "The Indian Child Welfare Act of 1978: A Critical Analysis." Hastings Law Review, in press.

Gross, Michael. "Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy." 56 Texas Law Review 1195 (1978).

Lawritson, Jon L. "Indian Child Welfare Act." In Advocacy for the Legal Interests of Children, edited by Donald C. Bross. Denver: National Association of Counsel for Children, 1980, pp. 476-483.

Marovsek, Linda A. "The Indian Child Welfare Act of 1978: Provisions and Policy." 25 South Dakota Law Review 98 (1980).

U.S. Department of the Interior, Bureau of Indian Affairs. "Guidelines for State Courts; Indian Child Custody Proceedings: Final Recommended Guidelines." 44 Federal Register, 26 November 1979, pp. 67584-67595.

U.S. Department of the Interior, Bureau of Indian Affairs. "Tribal Reassumption of Jurisdiction over Child Custody Proceedings: Final Regulations Effective August 30, 1979." 44 Federal Register, 31 July 1979, pp. 45092-45107.

Psychiatry and Psychology

Bybee, Rodger W., ed. "Violence Toward Youth in Families." 35 Journal of Social Issues, entire issue (1979).

Crouch, R. "An Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child." 8 Family Law Quarterly 49 (1979).

Dembitz, Nanette. "Beyond any Discipline's Competence: Review of Beyond the Best Interests of the Child." 83 Yale Law Journal 1304 (1974).

Goldstein, J.; Freud, A.; and Solnit, A. Before the Best Interests of the Child. New York: Free Press, 1979.

Goldstein, J.; Freud, A.; and Solnit, A. Beyond the Best Interests of the Child. New York: Free Press, 1968.

Strauss, Peter L., and Strauss, Joanna B. "Book Review of Beyond the Best Interests of the Child." 74 Columbia Law Review 996 (1974).

Watson, Andrew S. Psychiatry for Lawyers. New York: International Universities Press, Inc., 1968.

Ziskin, Jay. Coping with Psychiatric and Psychological Testimony. 2nd ed. Beverly Hills: Law and Psychology Press, 1975.

Rights of Parents

Ashman, Alan. "Right to Counsel...Child Custody." 63 American Bar Association Journal 1472 (1977).

Citizens' Committee for Children of New York, Inc. The Parents' Rights Unit and Evaluation Study. New York: Citizens' Committee for Children of New York, Inc., 1977.
Availability: Citizens' Committee for Children, 105 East 22nd Street, New York, New York 10010. Price: $4.00, 23 pp.

Dayton, John W. "Indigent Parents: Defendants Have a Right to Court-Appointed Counsel in Neglect Proceedings." 5 Texas Tech Law Review 857 (1974).

Driver, Barbara C. "Indigent Parents' Right to Counsel in Child Neglect Cases." 46 Tennessee Law Review 649 (1979).

Duncan, Elaine E. "Recognition and Protection of the Family's Interests in Child Abuse Proceedings." 13 Journal of Family Law 803 (1974).

Termination of Parental Rights

Campbell, Catherine. "The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause." 4 Suffolk University Law Review 632 (1970).

Chaikin, Douglas A. "Termination of Parental Rights and the Lesser Restrictive Alternative Doctrine." 12 Tulsa Law Journal 528 (1977).

Chambers, Coeta. "Proceedings to Terminate Parental Rights: Too Much or Too Little Protection for Parents?" 16 Santa Clara Law Review 337 (1975-76).

Day, David. "Termination of Parental Rights Statutes and the Void for Vagueness Doctrine: A Successful Attack on the Parens Patriae Rationale." 16 Journal of Family Law 312 (1978).

Galliher, Keith, Jr. "Termination of the Parent-Child Relationship: Should Parental I.Q. be an Important Factor?" 1973 Arizona State Law Journal: Law and the Social Order 855 (1973).

Ketcham, Orman, and Babcock, R., Jr. "Statutory Standards for the Involuntary Termination of Parental Rights." 29 Rutgers Law Review 530 (1976).

Kiser, W. David. "Termination of Parental Rights: Suggested Reforms and Responses." 16 Journal of Family Law 239 (1978).

Payne, Anne T. "The Law and the Problem Parent: Custody and Parental Rights of Homosexual, Mentally Retarded, Mentally Ill and Incarcerated Parents." 16 Journal of Family Law 797 (1977-78).

Recent Developments: Duty of the state to provide supportive services to a parent before terminating the parent's rights, In re M.A. 529 P.2d 333 (Colo. Ct. App. 1974). 14 Journal of Family Law 341 (1975).

Singleman, Beverly. "A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings." 17 Arizona Law Review 1055 (1975).

Thomas, Harold W. "Low Intelligence of the Parent: A New Ground for State Interference with the Parent-Child Relationship?" 13 Journal of Family Law 379 (1973-74).

Wald, Michael S. "State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights." 28 Stanford Law Review 623 (1976).

Legal Manuals

Carrieri, Joseph R. The Foster Child: From Abandonment to Adoption, A Course Handbook. New York: Practicing Law Institute, 1980. Availability: Practicing Law Institute, 810 Seventh Avenue, New York, New York 10019. Price: $25.00 softcover, Order #F4-3705, 395 pp.

Besharov, Douglas J. Juvenile Justice Advocacy: Practice in a Unique Court. New York: Practicing Law Institute, 1974. Copies may be purchased from Practicing Law Institute, 810 Seventh Avenue, New York, New York 10019.

National Association of Counsel for Children. Advocacy for the Legal Interests of Children: A Trial Notebook. Edited by Donald Bross. Denver: National Association of Counsel for Children, 1980. Availability: National Association of Counsel for Children, 1205 Oneida Street, Denver, Colorado 80302.

National Association of Counsel for Children. Legal Representation of the Maltreated Child: A Trial Notebook. Edited by Donald Bross. Denver: National Association of Counsel for Children, 1979. Availability: National Association of Counsel for Children, 1205 Oneida Street, Denver, Colorado 80220.

Pena, Enrique. A Coursebook on the Legal Process for Social Workers: Protecting Texas Children. El Paso: Crichet Printing Co., 1980. Copies may be purchased from Crichet Printing Co., 921 Myrtle, El Paso, Texas 79901. Price: $12.50.

Practicing Law Institute. The Abused and Neglected Child/Multidisciplinary Court Practice. New York: Practicing Law Institute, 1978. Copies may be purchased from Practicing Law Institute, 810 Seventh Avenue, New York, New York 10019. Price: $20.00.

Support Center for Child Advocates, Inc., and the Committee on Child Abuse, Young Lawyers Section of the Philadelphia Bar Association. How to Handle a Child Abuse Case: A Manual for Attorneys Representing Children. Philadelphia: Support Center for Child Advocates, Inc., 1978.
Copies may be purchased from the Support Center, 1315 Walnut Street, Suite 1406, Philadelphia, Pennsylvania 19107.

Videotapes

George Warren Brosn School of Social Work, Washington University. Referral Process II: Juvenile Court and Family Services. St. Louis: Washington University, 1976.
Availability: Region VI Resource Center on Child Abuse and Neglect, The University of Texas at Austin, 2609 University Avenue, Austin, Texas 78712. #24-20. Videotape: 15 min./black & white.

Missouri University, Columbia Academic Support Center. Criminal Court Procedures. Columbia, Missouri: University of Missouri, 1975.
Availability: University of Missouri, Film Library, 505 East Stewart Road, Columbia, Missouri 65201. Videocassette: 3/4"/ 31 min./ color. Price: $57.00; Rental Price: $5.00 for 5 days.
Alternate Availability: National Center on Child Abuse and Neglect, #CA-00091.

Missouri University, Columbia Academic Support Center. Juvenile Court Procedures. Columbia, Missouri: University of Missouri, 1975.
Availability: University of Missouri, Film Library, 505 East Stewart Road, Columbia, Missouri 65201. Videocassette: 3/4"/ 29 min./color. Price: $38.50; Rental Price: $5.00 for 5 days.
Alternate Availability: National Center on Child Abuse and Neglect, #CA-00094.

Missouri University, Columbia Academic Support Center. Presenting the Case. Columbia, Missouri: University of Missouri, 1975.
Availability: University of Missouri, Film Library, 505 East Stewart Road, Columbia, Missouri 65201. Videocassette: 3/4"/ 32 min./color. Price: $5.00 for 5 days.
Availability: National AudioVisual Center, GSA, Order Section, Washington, D.C. 20409. 16mm film: 32 min./black & white. Price: $12.50.
Alternate Availability: National Center on Child Abuse and Neglect, #CA-00034.

National Institute of Mental Health (DHHS). Doctor in Court. (1976). Availability: Region VI Resource Center on Child Abuse and Neglect, The University of Texas at Austin, 2609 University Avenue, Austin, Texas 78712. 16mm film: 31 min./color. #25-4.

National Center for the Prevention and Treatment of Child Abuse and Neglect. A Self-Instructional Audiovisual Program for Professionals: The Role of the Juvenile Court Judge. (1976). Availability: Region VI Resource Center on Child Abuse and Neglect, The University of Texas at Austin, 2609 University Avenue, Austin, Texas 78712. Videotape: 30 min./black & white. #1-7.

National Center on Child Abuse and Neglect. We Can Help: A Curriculum on the Identification, Reporting, Referral, and Case Management of Child Abuse and Neglect (NCCAN Curriculum). (1975). 16mm film.

The Role of the Courts: Unit 11. Film with manual, 40 pp. Availability: National Center on Child Abuse and Neglect, DHHS/ Children's Bureau, P. O. Box 1182, Washington, D.C. 20013.

Presenting the Case: Unit 13. Film: 32 min./black & white. Availability: Region VI Resource Center on Child Abuse and Neglect, The University of Texas at Austin, 2609 University Avenue, Austin, Texas 78712. #49-5.

The Medical Witness: Unit 14. Film: 35 min./color. Availability: Region VI Resource Center on Child Abuse and Neglect, The University of Texas at Austin, 2609 University Avenue, Austin, Texas 78712. #49-4.

Region VI Resource Center on Child Abuse and Neglect. Dallas-Fort Worth Mental Health Association Conference on Child Abuse and Neglect: Judge James Delaney. (1976). Videotape: 30 min./color. (#18).

The Psychiatric Expert in the Case of an Emotionally Maltreated Child. (1978). Videocassette: 3/4"/45 min. (manual in progress). (#36).

The Social Worker as a Witness. (1976). Videotape: 55 min./color. (manual available). (#40).

Availability: Region VI Resource Center on Child Abuse and Neglect, The University of Texas at Austin, 2609 University Avenue, Austin, Texas 78712.

Texas Department of Human Resources, Child Advocacy Resources Expansion Project. The Psychiatric Expert in the Case of an Emotionally Maltreated Child. (1978). Availability: Region VI Resource Center on Child Abuse and Neglect, The University of Texas at Austin, 2609 University Avenue, Austin, Texas 78712. Film: 45 min. Price: $60.00 for 1/2" videotape; $80.00 for 3/4" videocassette.

University of Wisconsin Center for Social Service. Legal Training For Child Welfare Workers. (1975). Availability: University of Wisconsin Extension, 610 Langdon Street, Madison, Wisconsin 53706. Videocassettes and manuals. (Code #TP-010). Price: manual, no charge.

National Legal Resource Center for Child Advocacy and Protection

The National Legal Resource Center for Child Advocacy and Protection, located in Washington, D. C., is a program of the Young Lawyers Division of the American Bar Association. Services of the Resource Center are available to provide technical assistance to child representation projects. Where the staff is unable to respond directly to a request for information or assistance, it will at least be able to identify other helpful sources.

Publication List

The following materials are available from NLRC-CAP.

Newsletter

Legal Response: Child Advocacy and Protection (Covers legal aspects of child abuse and neglect, recent court cases, new and pending legislation, etc.) - FREE.

Book

Advocating for Children in the Courts: An ABA National Institute Manual. 547 pages - $21.00.

Other Materials

Access to Child Protective Records: A Basic Guide to the Law and Policy (Covers issues related to confidentiality and privacy of welfare records) - $3.00.

The Child Abuse Legal Representation Project: Suggestions for Effective Implementation (Describes how to start a program to represent children in child protective court proceedings) - $2.00.

Special Education Advocacy for the Maltreated Child (Describes how to use state and federal law to obtain services for the handicapped child) - $2.00.

National Directory of Programs Providing Court Representation to Abused and Neglected Children - FREE.

Representing Children and Parents in Abuse and Neglect Cases (Suggests a proper role for counsel in child protective proceedings as well as case strategies) - $1.00.

Periodic Judicial Review of Children in Foster Care Issues Related to Effective Implementation - $1.00.

Child Sexual Abuse: Legal Issues and Approaches - $3.00.

To order any of the above publications, please send a check or money order for desired materials, made payable to the NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, 1800 M Street, N.W., 2nd Floor South, Washington, D.C. 20036.

APPENDIX A

REVIEW OF CHILDREN IN PLACEMENT, COMMENTARY ON TITLE 2, CHAPTER 18, TEXAS FAMILY CODE BY JUDGE ENRIQUE PEÑA

REVIEW OF CHILDREN IN PLACEMENT

(SEC. 18.01 - 18.06, TITLE 2, FAMILY CODE)

Judge Enrique H. Peña
327th District Court
El Paso, Texas

Texas Center For The Judiciary

November 15, 1979

Austin, Texas

FOREWORD

"Many of the more than 500,000 children in the U. S. foster care system could be returned to their biological parents or freed for adoption into permanent loving homes. Yet the sad fact is that too many of these children spend substantial portions of their childhoods in temporary care - by default. This can be traced to a widespread lack of effective tightly monitored case management by the courts and social services agencies responsible for these children.[1]"

"Children placed out of their homes are not only likely to be cut off from families, but also abandoned psychologically and sometimes literally by the public systems that assume responsibility for them. They are, in effect, children in double jeopardy.[2]"

In 1973, the National Council of Juvenile and Family Court Judges became concerned with the problem of children in foster or institutional care being lost in the vast system and adopted a resolution -- this benchmark resolution by the National Council gave unified support to a role that an increasing number of juvenile and family court judges across the country have been playing for some time -- that of active advocate for children.

These concerned judges were aware that childhood is timelimited, and too often over by the time bureaucratic wheels get around to turning. Because of this, they realized that to make permanency of home life truly a special target for every child it is crucial for courts and social agencies to formulate and adhere to a plan -- complete with timetable -- for each child in care. The goal should be to restore the child to biological parents, or, if that is not feasible within a reasonable amount of time, to consider terminating parental rights and placing the child for adoption.

CONCERN FOR CHILDREN IN PLACEMENT

(Sec. 18.01 - 18.05, Title 2, Family Code)

1. HOW DID THE CASE COME BEFORE THE COURT?

A. Suit affecting parent-child relationship OR an affidavit of relinquishment where DHR is managing conservator. (Continuing jurisdiction.)

> Sec. 18.01 (a). In a suit affecting the parent-child relationship in which the Texas Department of Human Resources has been named by the court or in an affidavit of relinquishment of parental rights as the managing conservator of a child, the court shall hold a hearing to review the conservatorship appointment and the placement of the child by the department in foster home care, group home care, or institutional care.

B. Parent voluntarily relinquishes custody to DHR, petition must be filed within 60 days.

> Sec. 18.02(a). If a person, managing conservator, or guardian of the person of a child who is not subject to the continuing jurisdiction of a court under this title voluntarily agrees to surrender the custody, care, or control of a child to the Texas Department of Human Resources, the department, not later than 60 days after taking possession of or exercising control of the child, shall file a suit affecting the parent-child relationship under this title, establishing a court of continuing jurisdiction for the child, and requesting a review of the placement of the child in foster home care, group home care, or institutional care.

C. A hearing must be held no sooner than 5-1/2 months, no later than 7 months from date of last hearing OR from date DHR took possession.

> Sec. 18.01(b). The hearing shall be held not earlier than five and one-half months and not later than seven months after the date of the last hearing in the suit unless, for good cause shown by any party, an earlier hearing is approved by the court.

Sec. 18.02(d). The hearing shall be held not earlier than five and one-half months and not later than seven months after the date that the department took possession of or exercise control over the child unless, for good cause shown by any party, an earlier hearing is approved by the court.

II. WHO ARE PROPER PARTIES?

A. Following persons are entitled to service of citation:

(1) Managing conservator
(2) Possessory conservator
(3) Persons, if any, having access to child
(4) Persons, if any, required to support child
(5) Guardian of person and/or estate of child
(6) Each parent whose rights have not been terminated
(7) Alleged father or probable father, unless waiver of interest executed or unknown
(8) DHR
(9) Foster parent
(10) Any other person or agency having an interest of child

Sec. 18.02(c). In addition to those persons listed in Section 11.09(a) of this code as entitled to service of citation in a suit affecting the parent-child relationship, a person listed in Section 18.03 of this code is entitled to service of citation.

Sec. 18.03. The following persons are entitled to at least 10 days' notice of a hearing to review a child placement and are entitled to present evidence and be heard at the hearing:

(1) the Texas Department of Human Resources
(2) the foster parent or director of the group home or institution where the child is residing
(3) each parent of the child
(4) the managing conservator or guardian of the person of the child, and
(5) any other person or agency named by the court to have an interest in the welfare of the child

III. NATURE OF HEARING

A. Statute <u>does not</u> prescribe the manner in which hearing is to be conducted.

(1) Issues:

(a) Formal vs. informal.
(b) Burden of proof: Parent or State?
(c) Are all necessary parties present?
(d) Do all parties understand nature of proceedings?
(e) Counsel necessary?

(f) Is child adequately represented?
(g) If necessary parties not present, what efforts have been made to give them adequate notice?
(h) If parents not present, what attempts to locate have been made with due diligence?
(i) Is detailed testimony necessary?
(j) Do parties have right to confront and cross-examine witnesses?
(k) Are authors of evaluative and progress reports available for cross-examination?
(l) Have parties had a reasonable opportunity to present evidence?
(m) Are parents entitled to see agency's progress report prior to hearing?
(n) What was original case plan?
(o) Do progress reports since initial disposition show improvement of conditions and cooperation by parents?
(p) Has agency provided services it agreed to provide?
(q) Has agency properly evaluated the current situation?
(r) Are agency's recommendations consistent with progress report evaluations?
(s) Has agency shown that continued out-of-home placement necessary?
(t) If restoration not possible, are other options available?
(u) Is child's attendance required?

Sec. 18.05. The Court in its discretion may dispense with the attendance of the child at a placement review hearing.

(2) Prevalent factors leading to abuse and neglect?

(a) Marital discord
(b) Discord in family relationships
(c) Divorce
(d) Alcohol addiction
(e) Physical illness
(f) Mental problems
(g) Emotional problems
(h) Sexual dysfunction
(i) Economic pressures
(j) Lack of parenting skills
(k) Negative parental reactions to the:

1. Physically handicapped child
2. Emotionally disturbed child
3. Adopted child
4. Child who exhibits anti-social behavior
5. Child who doesn't fulfill parental expectations
6. Adolescence

(3) Questioning the agency

(a) Relationship between child and parents?
(b) Relationship between spouses?
(c) Changes that must occur before child can be restored?
(d) What can agency do to resolve problem?
(e) What services are being provided?
(f) How will services help parent?
(g) How will services help child?
(h) Are parents participating and cooperating?
(i) Is time-table in case plan realistic?
(j) Is visitation being encouraged?
(k) Is visitation to be increased?
(l) Are parents achieving goals and objectives in care plan?
(m) What specific services is agency providing?
(n) Effect of services on problems?
(o) Are there any services agency cannot provide?
(p) Are goals and objectives of case plan still viable?
(q) What changes, if any, are necessary?

(4) Questioning the foster parent

(a) Are foster parents aware of case plan?
(b) Were they consulted in the preparation of case plan?
(c) Is child receiving services prescribed in case plan?
(d) Are other services required? If so, what other services?
(e) Is time-table of case plan realistic?
(f) Does parental visitation upset child?
(g) Where do visits take place?
(h) Should they be changed?
(i) Is agency participating and cooperating with foster parents?
(j) Suggestions?

(5) Questioning the child

(a) Is child aware of goals and objectives of case plan?
(b) Aware of responsibilities under case plan?
(c) Visitation with parents appropriate?
(d) If not, changes?
(e) Are services adequate?
(f) If not, what other services are required?

(6) Questioning the guardian/attorney ad litem

(a) Did you participate in formulation of case plan?
(b) Is time-table realistic?
(c) Should child be restored to parents?
(d) Is agency providing services under case plan?

V. RETURN OF CHILD

A. If DHR returns child to parent, court must be advised. No review if child with parent.

> Sec. 18.04(d). If the Texas Department of Human Resources returns a child to a parent for custody, care, or control, the department shall notify the court having continuing jurisdiction of the suit of the department's action and so long as the child remains under the custody, care, or control of the parent, no review of that placement is required under this chapter.

B. If child returned to parent and DHR resumes custody, court must be notified.

> Sec. 18.04(b). If a child has been returned to a parent and if the department resumes the custody, care or control of the child or designates any person other than a parent to have the custody, care, or control of the child, the department shall notify the court of its action.

C. If DHR resumes custody within three months after returning child to parent, period of parental custody shall not be considered in determining date of next review hearing.

> Sec. 18.04(c). If the department resumes the custody, care, or control of the child or designates a person other than a parent to have the custody, care, or control of the child within three months after returning the child to a parent, the period that that child was under the custody, care, or control of his or her parent shall not be considered in determining the date for the next placement review hearing.

VI. QUICK CHECK-LIST

A. PRIOR TO DATE OF HEARING:

(1) Court should require agency workers to submit to court a report:

(a) Indicating services offered to parents and child.
(b) Impact of such services.
(c) Outlining dispositional recommendations.

(e) Are additional services necessary?
(f) Are parents cooperating with agency? Foster parents? With you?
(g) Are parents participating in goals and objectives of case plan?
(h) Is visitation of child with parents adequate?
(i) Should visitation be increased? Decreased?
(j) Suggestions?

IV. DISPOSITIONS

A. Best interest of child is paramount.

> Sec. 18.06. At the conclusion of a placement review hearing under this chapter, the court in accordance with the best interest of the child, may order:

B. The court may order:

(1) Continue placement
(2) Return child to parents
(3) Order DHR to file suit to terminate parental rights, for permanent placement or adoption
(4) Parental rights terminated, place child for adoption
(5) DHR to provide services to preserve family unit

> Sec. 18.06(1)-(5). (1) that the foster care, group home care, or institutional care be continued; (2) that the child be returned to his or her parent or guardian; (3) if the child has been placed with the Texas Department of Human Resources under a voluntary agreement, that the department institute further proceedings to appoint the department as managing conservator or to terminate parental rights in order to provide permanent placement for the child or to make the child available for adoption; (4) if the parental rights of the child have already been terminated or the department has custody, care, and control of the child under an affidavit of relinquishment of parental rights naming the department as managing conservator, that the department attempt to place the child for adoption; or (5) the Texas Department of Human Resources to provide services to ensure that every effort has been made to enable the parents to provide a family for their own children.

(2) Court should require agency workers to inform the court if they are unable to provide services.

(a) The agency or court should provide a mechanism to receive complaints from parents and/or child who feels services are not being provided.

(3) Copies should be furnished to all parties and their counsel.

(4) Whether proper parties have been served/notified.

B. AT EACH REVIEW HEARING COURT SHOULD DETERMINE WHETHER:

(1) Suit affecting parent-child relationship, DHR, Managing Conservator.

(2) Affidavit of Relinquishment, DHR, Managing Conservator.

(3) Voluntary relinquishment of custody.

(4) To follow procedures set out in paragraph III.

C. AFTER REVIEW HEARING COURT SHOULD DETERMINE IF:

(1) Child should be returned home, if:

(a) Best interest tests met.
(b) NEW CONCEPT; Test for return home as that for removal.

(2) Child cannot be returned home, and parental rights not terminated, court should determine:

(a) What services have been provided for parents.
(b) What services have been afforded to parents.
(c) Whether parents satisfied with services offered.
(d) Extent of parental visitation.
(e) Whether agency is satisfied with parents cooperation.
(f) Whether additional services are needed to facilitate return of child.
(g) When return of child be expected.

(3) Termination of parent rights

(a) Grounds -- Sec. 15.02, Title 2.
(b) IJA/ABA Standards for Termination of Parental Rights.

1. For child under three (3) at time of placement, court should order termination after child in placement for six (6) months, unless exception.

2. For child under three (3) at time of placement, court should order termination after child in placement one (1) year, unless at six (6) months review hearing court finds parents have failed to maintain contact with child during previous six (6) months, unless exception.

3. Exceptions:

   a. Because of closeness of parent-child relationship, termination detrimental to child.
   b. Child placed with relative who does not wish to adopt.
   c. Child needs special treatment.
   d. Permanent family placement is unavailable.
   e. Child over ten (10) objects to termination.

IN THE DISTRICT COURT OF _____ COUNTY, TEXAS

_____ JUDICIAL DISTRICT

IN THE MATTER OF:)
)
) NO.
)

REVIEW HEARING ORDER

THIS MATTER having come for a review hearing on the _____ day of _____, 19__; present for the hearing were: ( ) mother; ( ) mother's attorney; ( ) father; ( ) father's attorney; ( ) child; ( ) guardian or attorney ad litem for child; ( ) DHR case worker _____; ( ) Assistant County/District Attorney; ( ) Other: _____.

The court having reviewed the files and records herein, and being fully advised in the premises, now makes the following:

ORDER:

1. That ( ) foster care; ( ) group home care; ( ) institutional care be continued.

2. That the child be returned to ( ) his/her parent(s); ( ) his/her guardian.

3. That ( ) DHR institute further proceedings to appoint DHR as managing conservator; ( ) that DHR institute further proceedings to terminate parental rights in order to provide permanent placement for child or make child available for adoption.

4. That ( ) DHR attempt to place child for adoption.

5. That DHR provide the following services to insure that every effort has been made to enable the parents to provide a family for their own child:

_____
_____
_____

THE COURT FINDS THE FOLLOWING:

1. That there has been no visitation between parent and child.

2. That visitation has been ( ) frequent; ( ) infrequent.

3. That the infrequency or lack of visitation is a result of:

_____
_____
_____

4. That DHR ( ) is ( ) is not satisfied with the cooperation given it by the parents.

5. That the parent ( ) is ( ) is not satisfied with the services provided by DHR.

6. That the following additional services are required and should be provided to the parents:

_____

_____

_____

8. That the child is expected to be returned home on approximately _____.

( ) The court advised the parents that termination of parental rights may be ordered at the next review hearing if child is not returned home.

FURTHER ORDERS OF THE COURT:

_____

_____

_____

_____

_____

_____

DATED THIS _____ day of _____, 19___.

_____
JUDGE

COPY RECEIVED:

_____
( ) Assistant County/District Attorney
( ) DHR Caseworker

_____
( ) Mother; or
( ) Mother's Attorney

_____
( ) Father; or
( ) Father's Attorney

_____
( ) Guardian or Attorney Ad Litem for Child

_____
( ) Other _____

APPENDIX B

INDIAN CHILD WELFARE ACT OF 1978,
TITLE I AND SUMMARY

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act (85 Stat. 688, 689); 43 USC 1606.

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 689), as amended; 43 USC 1602.

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of title 18, United States Code and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

Public Law 95-608
95th Congress

An Act

To establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes.

Nov. 8, 1978
[S. 1214]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Child Welfare Act of 1978".

Indian Child Welfare Act of 1978.
25 USC 1901 note.

SEC. 2. Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

25 USC 1901.

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

Congress, responsibility for protection of Indians.

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 USC 1902.

SEC. 3. The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

Definitions.
25 USC 1903.

SEC. 4. For the purposes of this Act, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

39-139 O - 78 (531)

shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13).

(c) Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Parental rights, voluntary termination.
25 USC 1913.

SEC. 103. (a) Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

25 USC 1914.

SEC. 104. Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of com-

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

TITLE I—CHILD CUSTODY PROCEEDINGS

Indian tribes, exclusive jurisdiction over Indian child custody proceedings. 25 USC 1911.

SEC. 101. (a) An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

Foster care placement, court proceedings. 25 USC 1912.

SEC. 102. (a) In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court

the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

Reassumption, jurisdiction over child custody proceedings. 25 USC 1918. 18 USC prec. 1151 note. 25 USC 1321. 28 USC 1360 note.

SEC. 108. (a) Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b)(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 101(a) of this Act are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 101(b) of this Act, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 101(a) over limited community or geographic areas without regard for the reservation status of the area affected.

(c) If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 109 of this Act.

States and Indian tribes, agreements. 25 USC 1919.

SEC. 109. (a) States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such

petent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act.

Adoptive placement of Indian children. 25 USC 1915.

SEC. 105. (a) In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

Petition, return of custody. 25 USC 1916.

SEC. 106. (a) Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 102 of this Act, that such return of custody is not in the best interests of the child.

Removal from foster care home.

(b) Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this Act, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

25 USC 1917.

SEC. 107. Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement,

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV-B and XX of the Social Security Act or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this Act. The provision or possibility of assistance under this Act shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

42 USC 620, 1397.

Additional services.

SEC. 202. The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to—

25 USC 1932.

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

Funds.

SEC. 203. (a) In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health, Education, and Welfare, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health, Education, and Welfare: *Provided*, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

25 USC 1933.

revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

Improper removal of child from custody.
25 USC 1920.

SEC. 110. Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

25 USC 1921.

SEC. 111. In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this title, the State or Federal court shall apply the State or Federal standard.

Emergency removal of child.
25 USC 1922.

SEC. 112. Nothing in this title shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this title, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

Effective date.
25 USC 1923.

SEC. 113. None of the provisions of this title, except sections 101(a), 108, and 109, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after the enactment of this Act, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

TITLE II—INDIAN CHILD AND FAMILY PROGRAMS

25 USC 1931.

SEC. 201. (a) The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to—

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

TITLE IV—MISCELLANEOUS

Day schools.
25 USC 1961.

SEC. 401. (a) It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

Report to congressional committees.

(b) The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health, Education, and Welfare, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from the date of this Act. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

Copies to each State.
25 USC 1962.

SEC. 402. Within sixty days after enactment of this Act, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this Act, together with committee reports and an explanation of the provisions of this Act.

25 USC 1963.

SEC. 403. If any provision of this Act or the applicability thereof is held invalid, the remaining provisions of this Act shall not be affected thereby.

Approved November 8, 1978.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 95-1386, accompanying H.R. 12533 (Comm. on Interior and Insular Affairs).
SENATE REPORT No. 95-597 (Comm. on Indian Affairs).
CONGRESSIONAL RECORD:
Vol. 123 (1978): Nov. 4, considered and passed Senate.
Vol. 124 (1978): Oct. 14, H.R. 12533 considered and passed House; passage vacated, and S. 1214, amended, passed in lieu.
Oct. 15, Senate concurred in House amendments.

○

(b) Funds for the purposes of this Act may be appropriated pursuant to the provisions of the Act of November 2, 1921 (42 Stat. 208), as amended. 25 USC 13.

SEC. 204. For the purposes of sections 202 and 203 of this title, the term "Indian" shall include persons defined in section 4(c) of the Indian Health Care Improvement Act of 1976 (90 Stat. 1400, 1401). 25 USC 1934. 25 USC 1603.

TITLE III—RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES

SEC. 301. (a) Any State court entering a final decree or order in any Indian child adoptive placement after the date of enactment of this Act shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show— Final decree, information to be included. 25 USC 1951.

(1) the name and tribal affiliation of the child;
(2) the names and addresses of the biological parents;
(3) the names and addresses of the adoptive parents; and
(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

SEC. 302. Within one hundred and eighty days after the enactment of this Act, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act. Effective date. Rules and regulations. 25 USC 1952.

EXPLANATION OF THE PROVISIONS OF THE INDIAN CHILD WELFARE ACT OF 1978

P.L. 95-608

"The Indian Child Welfare Act of 1978: (P.L. 95-608) establishes nationwide procedures for the handling of Indian child placements and authorizes the establishment of Indian child and family service programs.

The Act applies to Indian child custody proceedings and includes foster care placements where the parent or custodian cannot have the child returned on demand, but where parental rights have not been terminated; in termination of parental rights proceedings, in pre-adoptive and adoptive placements. It does not apply to a placement based on an act which, if committed by an adult would be deemed a crime, or upon an award, in a divorce proceeding, of custody to one of the parents (Sec. 4(1)).

An Indian is defined as any person who is a member of an Indian tribe, or who is an Alaskan Native and a member of a Regional Corporation as defined in the Alaska Native Claims Settlement Act (85 Stat. 688.689) (Sec 4 (3)).

An Indian child means any unmarried person who is under 18 and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe (Sec. 4(4)).

An Indian child's tribe is defined as (a) The Indian tribe in which an Indian child is a member or eligible for membership or (b) in the care of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the most significant contacts (Section 4 (5)).

An Indian tribe is any Indian tribe, band, nation, or other organized group of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village as defined in section 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688,689), as amended (Sec. 4(8)).

Indian reservation means Indian country as defined in Section 1151 of Title 18, United States Code and any lands, not covered under such section, title to which is either held by the United States in trust for any Indian tribe or individual subject to a restriction by the United States Against alienation. (Sec. 4(10)).

Title I

Title I of PL 95-608 contains evidentiary standards and notice and consent requirements for State courts adjudicating Indian child custody proceedings. Section 101(a) vests exclusive jurisdiction of such proceedings in the tribal courts in the case where the Indian child involved is residing or domiciled within a reservation except where such jurisdiction is otherwise vested in the State.

Section 101(b) requires that upon the petition of an Indian child's parent, Indian custodian, or tribe, any proceeding to establish a foster care placement or to terminate parental rights to an Indian child be transferred to the tribal court of the child's tribe in the absence of good cause to the contrary. Such a transfer would not occur if either of the parents objected or if the tribe declined jurisdiction. Section 101(c) gives the Indian child's tribe the right to intervene in any State court proceeding for the foster care placement of or termination of parental rights to an Indian child.

Section 101(d) extends to the public acts, records, and judicial proceedings in child custody proceedings of any Indian tribe the same full faith and credit as a State receives.

Section 102 requires the State, in the case of an involuntary child custody proceeding, to notify the parents, Indian custodian, if any, and the tribe of the Indian child involved by registered mail at least 10 days before the beginning of the proceeding. Any such party has twenty additional days, if requested, to prepare for the proceeding. In the case where the State is unable to locate the above parties, notice is given to the Secretary of the Interior and he then has fifteen days to provide such notice.

Section 102(b) of the Act gives any parent or Indian custodian of an Indian child who has been determined by the State court to be indigent the right to court-appointed counsel in a child custody proceeding. The court may appoint counsel for the child if it deems it to be in the child's best interest. The Secretary is responsible for payment of such counsel where the State makes no provision for it and would pay such fees out of funds which may be appropriated pursuant to the Snyder Act.

Sections 102(d), (e), and (f) set standards of evidence that a State court has to find before placing an Indian child outside of the home. First, the court must be satisfied that active efforts have been made to provide remedial and rehabilitative services to the family involved and that those efforts were unsuccessful. Then, in the case of a foster care placement, the determination of the court to remove the child must be supported by clear and convincing evidence that continued custody by the parent or custodian is likely to result in serious emotional or physical damage to the child. That evidence would have to be beyond a reasonable doubt in the case of a proceeding to terminate parental rights.

Section 103 sets forth the requirements that must be fulfilled in the case where a parent is consenting to the removal of the child from the home. This section requires that the presiding judge certify that the terms and consequences of the consent were fully explained to the Indian parent or custodian and that the consequences of the consent were understood. This includes assuring that the explanation was translated into the native language of the Indian involved, in the case where the individual does not understand English. The parents are able to withdraw their consent at any time before the final decree of adoption and for two years after the final decree if it is shown that the consent was obtained through fraud or duress.

Section 104 gives the Indian child, the parents or Indian custodian, or the tribe of the child the right to petition for invalidation of a foster care placement or a termination of parental rights if sections 101, 102, or 103 are violated.

Section 105 sets forth preferences to be followed when placing an Indian child under State law in an adoptive or foster care situation. Section 105 requires that preference in an adoptive situation be given to the child's extended family, then to other members of the child's tribe, and finally to other Indian families. This preference list is not a restrictive one, in that, if no appropriate placement is found among the groups listed, the Indian child may still be placed in another home. In the case of a foster care placement, preference must be given to an Indian foster home or institution before the child is placed in another setting. The child's tribe may change the order of preferences set forth in Section 105, and where appropriate, the preferences of the Indian child and parent shall be considered. Records of efforts to comply with preferences and such records are available to the tribe and the Secretary.

Subsection (d) of Section 105 requires that the standards to be applied in meeting the preference requirements are the prevailing social and cultural standards of the Indian community.

Section 106 of the Act gives the biological parent or prior Indian custodian the right to petition for return of custody of an Indian child when a final decree of adoption has been vacated or the adoptive parents voluntarily terminate their parental rights. The child is to be returned to the petitioner unless the court finds that such a return of custody would not be in the best interest of the child.

Section 107 allows any Indian who has reached age 18 who was the subject of an adoptive placement, to find out his or her tribal affiliation and any other information that might be necessary to protect any rights flowing from that affiliation.

Section 108 sets forth the procedure that an Indian tribe must undergo if it has lost jurisdiction of child custody matters under P.L. 83-280 or any other Federal law, and it wants to reassume that jurisdiction. This includes preparing a plan for the reassumption of jurisdiction and submitting that plan to the Secretary of the Interior for approval. Section 108 also allows for partial retrocession of jurisdiction and Section 109 allows the States and tribes to enter into mutual agreements regarding jurisdiction, thus allowing some flexibility.

Section 110 requires any State court to decline jurisdiction over the custody of an Indian child where the petitioner for custody has improperly removed the child from the custody of the parent or Indian custodian or has kept the child after a visit.

Section 112 states that nothing in title I of the enrolled Act shall be construed as preventing the emergency removal of an Indian child in order to prevent imminent physical damage or harm to that child.

Section 113 provides that except for Sections 101(a), 108, and 109, none of the provisions of Title I shall affect a proceeding under State law which was initiated or completed within 180 days after the enactment of the Act, but does apply to a subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

Finally, Section 114 contains an effective date for Title I of six months after enactment of the Act.

Title II

Section 201(a) of title II gives the Secretary of the Interior the authority to make grants to Indian tribes and organizations for the establishment and operation of Indian child and family services programs on or near the reservations. The objective of these programs would be to prevent the breakup of Indian families.

Section 201(b) authorizes the use of funds appropriated under Section 201(a) as the non-federal matching share for Federal financial assistance programs which contribute to the purpose for which the original funds were authorized. The provisions of the Act are not to be a basis of denial of benefits for reduction of any assistance authorized under Titles IV B and XX of the Social Security Act or other Federally assisted programs. The section also provides that licensing or approval of foster or adoptive homes or institutions by an Indian tribe is deemed equivalent to State licensing or approval for purposes of qualifying for assistance under a Federally assisted program.

Section 202 gives the Secretary of the Interior the authority to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs. Section 203 gives the Secretary of the Interior authority to enter into agreements with the Secretary of Health, Education, and Welfare regarding the establishing, operating, and funding of the Indian Child and Family Programs. The Secretary of Health, Education, and Welfare is authorized under that section to use funds appropriated to HEW for similar programs.

Title III

Title III sets up comprehensive record keeping requirements for Indian child placement proceedings. Section 301(a) requires the State court to provide the Secretary with a copy of the final decree or order of adoption of an Indian child plus information about the tribal affiliation of the child, the names and addresses of the biological parents and adoptive parents, and the identity of any agency having files or information relating to the adoptive placement. This information is not to be subject to the Freedom of Information Act.

Sec. 301(b) provides that at the request of an adopted Indian child over 18, the adoptive or foster parents of the Indian child, or the tribe in which the child may be eligible for membership, the Secretary is required to disclose information as may be necessary to determine eligibility for enrollment, or rights and benefits associated with tribal membership. In the case where the biological parent has requested anonymity and the child wants to establish a tribal membership, the Secretary is allowed to certify to the Indian child's tribe that the child's parentage and other circumstances entitle his or her enrollment in the tribe.

Sec. 302 provides for the promulgation within 180 days, rules and regulations within to implement the Act.

Title IV

Section 401 of title IV requires the Secretary of the Interior to prepare a report on the feasibility of providing Indian children with schools located near their homes. The Secretary is required to submit a report to Congress

within 2 years of the date of enactment of the Act.

Special consideration is to be paid to providing educational facilities for children in the elementary grades.

Finally, Section 402 requires the Secretary to send copies of the Act to the Governor, chief justice of the highest court of appeal, and attorney general of each State. Accompanying the Act, he is required to send the committee reports on the Act and an explanation of the provisions of the Act.

APPENDIX C

PROTECTION OF THE FAMILY
TEXAS FAMILY CODE, TITLE 4, CHAPTER 71

TITLE 4. PROTECTION OF THE FAMILY

CHAPTER 71. PROTECTIVE ORDERS

Section 71.01.	Definitions
Section 71.02.	Commencement of Proceeding
Section 71.03.	Venue
Section 71.04.	Application for Protective Order
Section 71.05.	Contents of Application
Section 71.06.	Dismissal of Application
Section 71.07.	Citation
Section 71.08.	Answer
Section 71.09.	Hearing
Section 71.10.	Findings
Section 71.11.	Portective Order
Section 71.12.	Agreed Orders
Section 71.13.	Duration of Protective Orders
Section 71.14.	Modification of Orders
Section 71.15.	Temporary Orders
Section 71.16.	Warning on Protective Order
Section 71.17.	Copies of Orders
Section 71.18.	Duties of Law Enforcement Agencies
Section 71.19.	Relief Cumulative

Section 71.01. Definitions. (a) Except as provided by Subsection (b) of this section, the definitions in Section 11.01 of this code apply to terms used in this chapter.

(b) In this Chapter:

(1) ***"Court"*** means a court having jurisdiction of suits affecting the parent-child relationship under Subtitle A of Title 2 of this code or a county court.

(2) ***"Family violence"*** means the intentional use or threat of physical force by a member of a family or household against another member of the family or household, but does not include the reasonable discipline of a child by a person having that duty.

(3) ***"Family"*** includes individuals related by consanguinity or affinity, individuals who are former spouses of each other, and a foster child and foster parent, whether or not those individuals reside together.

(4) ***"Household"*** means a unit composed of persons living together in the same dwelling, whether or not they are related to each other.

(5) ***"Member of a household"*** includes a former member of a household who has filed an application or for whom protection is sought as provided by Subsection (c) of Section 71.04 of this code.

Section 71.02. Commencement of Proceedings. A proceeding under this chapter is commenced by the filing of an application for a protective order with the clerk of the court.

Section 71.03. Venue. An application may be filed:

(1) in the county where the applicant resides; or

(2) in the county where an individual alleged to have committed family violence resides.

Section 71.04. Application for Protective Order. (a) An application under this chapter is entitled "An application for a protective order."

(b) An application may be filed by:

(1) an adult member of a family or household for the protection of the applicant or for any other member of the family or household; or

(2) any adult for the protection of a child member of a family or household.

(c) A person who was a member of a household at the time the alleged family violence was committed is not barred from filing an application or from protection under this chapter even if the person no longer resides in the same household with the person who is alleged to have committed the family violence.

(d) The fee for filing an application is $16 and is to be paid to the clerk of the court in which the application is filed.

Section 71.05. Contents of Application. (a) An application must state:

(1) the name, address, and county of residence of each applicant and of each individual alleged to have committed family violence;

(2) the facts and circumstances concerning the alleged family violence;

(3) the relationships between the applicants and the individuals alleged to have committed family violence; and

(4) a request for one or more protective orders.

(b) If an application requests a protective order for a spouse and alleges that the other spouse has committed family violence, the application must state that no suit for the dissolution of the marriage of the spouses is pending.

(c) If an applicant is a former spouse of an individual alleged to have committed family violence:

(1) a copy of the decree dissolving the marriage must be attached to the application; or

(2) the application must state that the decree is unavailable to the applicant and that a copy of the decree will be filed with the court before the hearing on the application.

(d) If an application requests a protective order for a child who is subject to the continuing jurisdiction of a court under Subtitle A, Title 2, of this code or alleges that a child who is subject to the continuing jurisdiction of a court under Subtitle A, Title 2, of this code has committed family violence:

(1) a copy of the court orders affecting the conservatorship, possession, and support of or the access to the child must be filed with the application; or

(2) the application must state that the orders affecting the child are unavailable to the applicant and that a copy of the orders will be filed with the court before the hearing on the application.

(e) If the application requests the issuance of a temporary ex parte order under Section 71.15 of this code, the application must:

(1) contain a detailed description of the facts and circumstances concerning the alleged family violence and the need for immediate protective orders; and

(2) be signed by each applicant under an oath that the facts and circumstances contained in the application are true to the best knowledge and belief of each applicant.

Section 71.06. Dismissal of Application. If a suit for the dissolution of marriage is pending, no application or portion of an application involving the relationship between the spouses or their respective rights, duties, or powers may be considered, and the application or portion of the application relating to those parties shall be dismissed.

Section 71.07 Citation. (a) Each individual, other than an applicant, who is alleged to have committed family violence is entitled to service of citation on the filing of an application.

(b) Service of citation is not required before the issuance of a temporary ex parte order under Section 71.15 of this code.

Section 71.08. Answer. An individual served with citation may but is not required to file a written answer to the application. The answer may be filed at any time before the hearing.

Section 71.09. Hearing. (a) Unless a later date is requested by the applicant, the court, on the filing of an application, shall set a date and time for the hearing on the application. The date must be not later than 20 days after the date the application is filed.

(b) If a person entitled to service of citation is not served at least 48 hours before the time set for the hearing, the hearing must be rescheduled unless the person entitled to service is present at the hearing and waives notice of the hearing.

(c) If a hearing set under Subsection (a) of this section is not held because of the failure of a party to receive service of citation, the applicant may request the court to reschedule the hearing. The date for a rescheduled hearing under this subsection must be not later than 20 days after the date on which the request is made.

(d) Except as provided by Subsections (a), (b), and (c) of this section, the court may schedule hearings under this chapter as in other civil cases generally.

Section 71.10. Findings. (a) At the close of a hearing on an application, the court shall find whether or not family violence has occurred and whether or not family violence is likely to occur in the foreseeable future.

(b) If the court finds that family violence has occurred and that family violence is likely to occur in the foreseeable future, the court may make any protective order authorized by this chapter that is in the best interest of the family or household or a member of the family or household.

(c) A protective order may apply only to an individual, including an applicant, who is a party to the proceeding and who:

(1) is found to have committed family violence; or

(2) has agreed to the order under Section 71.12 of this code.

Section 71.11. Protective Order. (a) In a protective order the court may:

(1) prohibit a party from:

(A) committing family violence;

(B) directly or indirectly communicating with a member of the family or household;

(C) going to or near the residence or place of employment or business of a member of the family or household or any other place a member of trhe family or household may be;

(D) removing a child member of the family or household from the possession of a person named in the court order or from the jurisdiction of the court; or

(E) transferring, encumbering, or otherwise disposing of property mutually owned or leased by the parties, except when in the ordinary course of business;

(2) grant exclusive possession of a residence to a party and, if appropriate, direct one or more other parties to vacate the residence if:

(A) the residence is jointly owned or leased by the party receiving exclusive possession and by some other party denied possession;

(B) the residence is owned or leased by the party retaining possession; or

(C) the residence is owned or leased by the party denied possession but only if that party has an obligation to support the party granted possession of the residence or a child of the party granted possession;

(3) provide for possession of an access to a child of a party;

(4) require the payment of support for a party or for a child of a party if the person required to make the payment has an obligation to support the other party or the child;

(5) require one or more parties to counsel with a social worker, family service agency, physician, psychologist, or any other person qualified to provide psychological or social guidance;

(6) award to a party use and possession of specified property that is community property or jointly owned or leased; or

(7) prohibit a party from doing specified acts or require a party to do specified acts necessary or appropriate to prevent or reduce the likelihood of family violence.

(b) A protective order or an agreement approved by the court under this chapter does not affect the title to real property.

(c) A protective order made under this section that conflicts with any other court order made under Subtitle A, Title 2, of this code is to the extent of the conflict invalid and unenforceable.

Section 71.12. Agreed Orders. (a) To facilitate the settlement of a proceeding under this chapter, two or more parties to the proceeding may agree in writing, subject to the approval of the court, to do or refrain from doing any act that the court could order under Section 71.11 of this code. If all or part of an agreement is approved by the court, the part of the agreement approved shall be attached to the protective order and become a part of the order of the court.

(b) An agreement that is made a part of the court's order is enforceable as a court order and is not enforceable as a contract. The agreement expires when the court order expires.

Section 71.13. Duration of Protective Orders. (a) An order made under Section 71.11 of this code is effective for the period specified in the order, not to exceed one year.

(b) An order of a court having jurisdiction of a suit for divorce or annulment prevails over a conflicting portion of an order made under this title and relating to the parties to the suit for divorce or annulment.

Section 71.14. Modification of Orders. (a) On the motion of any party, the court, after notice to the other parties and a hearing, may modify a prior order to exclude any item included in the prior order or to include any item that could have been included in the prior order.

(b) An order may not be modified to extend the period of its validity beyond one year after the date the original order was made.

Section 71.15. Temporary Orders. (a) If the court finds from the information contained in an application that there is a clear and present danger of family violence, the court, without further notice to any other member of the family or household and without a hearing, may enter a temporary ex parte order for the protection of the applicant or any other member of the family or household. The court may direct any member of the family or household who is alleged to have committed family violence to do or refrain from doing specified acts.

(b) A temporary ex parte order is valid for the period specified in the order, not to exceed 20 days.

(c) On the request of an applicant or on the court's own initiative, a temporary ex parte order may be extended for an additional 20 days and may be extended thereafter for additional 20-day periods.

(d) The court in its discretion may dispense with the necessity of a bond inconnection with a temporary ex parte order.

(e) Any member of the family or household may at any time file a motion to vacate a temporary ex parte order, and on the filing of the motion the court shall set a date for a hearing on the motion as soon as possible.

(f) During the period of its validity, a temporary ex parte order prevails over any other court order made under Subtitle A, Title 2, of this code, except that on a motion to vacate the temporary ex parte order, the court shall vacate those portions of the temporary order shown to be in conflict with any other court order made under Subtitle A, Title 2, of this code.

Section 71.16. Warning on Protective Order. (a) Each protective order issued under this chapter, including a temporary ex parte order, shall have the following statement printed in bold-faced type or in capital letters:

"A PERSON WHO VIOLATES THIS ORDER MAY BE PUNISHED FOR CONTEMPT OF COURT BY A FINE OF AS MUCH AS $500 OR BY CONFINEMENT IN JAIL FOR AS LONG AS SIX MONTHS, OR BOTH."

(b) Each protective order issued under this chapter, except a temporary ex parte order, shall have the following statement printed in bold-faced type or in capital letters:

"A VIOLATION OF THIS ORDER BY COMMISSION OF FAMILY VIOLENCE MAY BE A CRIMINAL OFFENSE PUNISHABLE BY A FINE OF AS MUCH AS $2,000 OR BY CONFINEMENT IN JAIL FOR AS LONG AS ONE YEAR, OR BOTH."

Section 71.17. Copies of Orders. (a) A protective order made under this chapter shall be served on the person to whom the order applies in open court at the close of the hearing or in the same manner as a writ of injunction.

(b) The clerk of the court issuing a protective order under this chapter shall send a copy of the order to the chief of police of the city where the member of the family or household protected by the order resides, if the person resides in a city, or to the sheriff of the county where the person resides, if the person does not reside in a city.

Section 71.18. Duties of Law Enforcement Agencies. In order to insure that officers responding to calls are aware of the existence and terms of protective orders issued under this chapter, each municipal police department and sheriff shall establish procedures within the department or office to provide adequate information or access to information for law enforcement officers of the names of persons protected by order issued under this chapter and of persons to whom protective orders are directed.

Section 71.19. Relief Cumulative. Except as provided by this chapter, the relief and remedies provided by this chapter are cumulative of other relief and remedies provided by law.